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CORN PRODUCTS REFINING COMPANY AND CORN  
PRODUCTS SALES COMPANY PETITIONERS

FEDERAL TRADE COMMISSION

ON PETITION FOR CERTIFICATION TO THE UNITED STATES CIRCUIT COURT  
IN APPEALS FOR THE SEVENTH CIRCUIT

HEARD AND DECIDED AT THE SEVENTH CIRCUIT COURT

RECORDED AND INDEXED NOVEMBER 12, 1941





IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1944.

\_\_\_\_\_  
No.

CORN PRODUCTS REFINING COMPANY, A CORPORATION,  
AND CORN PRODUCTS SALES COMPANY, A  
CORPORATION,

*Petitioners,*

vs.

FEDERAL TRADE COMMISSION,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT.  
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IN THE  
**UNITED STATES CIRCUIT COURT OF APPEALS**  
FOR THE SEVENTH CIRCUIT.

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**No. 8116**

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CORN PRODUCTS REFINING COMPANY, A CORPORATION,  
AND CORN PRODUCTS SALES COMPANY, A CORPORATION,  
*Petitioners,*

*vs.*

FEDERAL TRADE COMMISSION,  
*Respondent.*

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PETITION FOR REVIEW OF ORDER OF THE FEDERAL  
TRADE COMMISSION.





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## Before Federal Trade Commission

*In the Matter of*

Corn Products Refining Company, } Docket No. 3633  
Corn Products Sales Company, Inc. }

## COMPLAINT.

The Federal Trade Commission, having reason to believe that the Corn Products Refining Company and the Corn Products Sales Company, Inc., hereinafter called Respondents, since June 19, 1936, have been and are now violating the provisions of Section 2(a) of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (Public No. 212, the Clayton Act), as amended by Section 1 of the Act of Congress entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes", approved June 19, 1936 (Public No. 692, the Robinson-Patman Act), hereby issues this its complaint against respondents and states its charges with respect thereto as follows, to wit:

Paragraph One: Respondent Corn Products Refining Company is a corporation organized and existing under the laws of New Jersey with its principal office and place of business at 17 Battery Place in the City and State of New York. Respondent Corn Products Sales Company, Inc. is a corporation organized under the laws of the State of New Jersey and has its principal office and place of business at 17 Battery Place, City and State of New York. Respondent Corn Products Sales Company, Inc. is a wholly owned sales subsidiary of respondent Corn Products Refining Company through which products manufactured by Corn Products Refining Company are sold and distributed. Corn Products Refining Company owns the entire capital stock of Corn Products Sales Company, Inc. and controls and directs Corn Products Sales Company, Inc.

Paragraph Two: Respondent, Corn Products Refining Company, is a large and powerful corporation holding a

dominating position in the field of the manufacture and sale of corn products. It has an authorized capital stock of \$100,000,000. Corn Products Refining Company owns and operates plants at Pekin and Argo, Illinois; North Kansas City, Missouri and Edgewater, New Jersey. The Argo, Pekin and North Kansas City plants have a corn grinding capacity of 155,000 bushels per day, with complete facilities for the finished fabrication of all known corn starch products, both for household and industrial use, and including well equipped carton and can plants and printing establishments for use in producing the many packaged products of the company. The Edgewater plant has a reserve corn grinding capacity of 30,000 bushels daily. Respondent's production of corn products exceeds that of all of its combined competitors. When respondent reduces the prices of corn products, its competitors conformably reduce the prices on the said commodities and when respondent advances the prices, competitors make similar advances in their prices.

Paragraph Three: At all times since June 19, 1936, respondents have been and are now engaged in the business of manufacturing, selling and distributing in interstate commerce products derived from corn. The principal products derived from corn are (1) Starch, both for food and laundry purposes; (2) Glucose or Corn Syrup; and (3) Corn Sugar. Starch is first manufactured from the corn, and glucose and grape sugar are made by treating the starch with certain acids, the resulting solid product being grape sugar and the resulting syrup being glucose. Glucose is largely used in the manufacture of candy, jellies, jams, preserves, and the like, as well as in the mixing of syrups. Grape sugar is used in the tanning, brewing, and wine trades. Starch is used for laundry purposes, as well as in various articles of food.

The principal by-products of corn resulting in the corn products business are gluten feed, corn oil, corn-oil cake and corn-oil meal, and these by-products result whether the principal products manufactured be starch, glucose, or corn sugar.

The Corn Products Refining Company, in addition to bulk products, produces the following branded products: Kingsford and Duryea Starches, Karo Syrup, Mazola Oil, Argo Corn Starch, Argo Gloss Starch, Kre-Mel Dessert and Linit.

Paragraph Four: Since June 19, 1936 in the course and conduct of their business, the respondents have been and are now manufacturing the aforesaid commodities at the aforesaid plants and have sold and shipped and do now sell and ship such commodities in commerce between and among the various states of the United States from the states in which their factories are located across state lines to purchasers thereof located in states other than the states in which respondents' said plants are located in competition with other persons, firms and corporations engaged in similar lines of commerce.

Paragraph Five: Since June 19, 1936, and while engaged as aforesaid in commerce among the several states of the United States and the District of Columbia, the respondents have been and are now, in the course of such commerce, discriminating in price between purchasers of said commodities of like grade and quality, which commodities are sold for use, consumption or resale within the several states of the United States and the District of Columbia in that the respondents have been and are now selling such commodities to some purchasers at a higher price than the price at which commodities of like grade and quality are sold to other purchasers generally competitively engaged with the first mentioned purchasers.

Paragraph Six: The aforesaid discriminations in price referred to in Paragraph Four are generally effected through the employment of delivered prices. The delivered prices charged buyers, while identical in terms of dollars and cents as to those located at any given point of delivery, are discriminatory among buyers located at diverse points of delivery. The differences in price between buyers located at diverse points of delivery are often substantial. To illustrate:

7 A manufacturer of candy located at St. Joseph, Missouri paid respondents a delivered price of \$3.40 a hundred pounds for a tank car of corn syrup weighing 95,800 pounds net. The freight paid by respondents on the said shipment was  $3\frac{1}{2}$ ¢ a hundred pounds. The price per hundred pounds, exclusive of freight, was \$3.365 to such buyer. A competing candy manufacturer located at Chicago, Illinois paid respondents at the same time, for goods of like grade and quality a delivered price of \$3.04 a hundred pounds. The freight switching charge paid by respondents on the said

*Complaint*

shipment was  $3\frac{1}{2}\text{¢}$  a hundred pounds. The price per hundred pounds, exclusive of freight, was \$3.005 to such buyer. The difference between \$3.365 and \$3.005 amounts to a discrimination in price of  $36\text{¢}$  a hundred pounds between the aforesaid buyers located at St. Joseph, Missouri and at Chicago, Illinois or \$344.88 on the aforesaid car.

Respondents' customers taking delivery of corn syrup at Kansas City, Missouri and supplied by respondents' North Kansas City plant are required to pay a price which is  $36\text{¢}$  a hundred pounds more than respondents' customers pay when taking delivery of goods of like grade and quality at Chicago, Illinois, which goods are supplied by respondents' Argo, Illinois plant. This amounts to a discrimination in price of  $36\text{¢}$  a hundred pounds between respondents' customers competing in the manufacture, sale and distribution of candy made from such corn syrup, who respectively take delivery at Kansas City, Missouri and Chicago, Illinois.

Paragraph Seven: The effect of said discriminations in price made by said respondents, as set forth in Paragraph Five herein, may be substantially to lessen competition in the sale and distribution of corn products between the said respondents and other manufacturers of corn products and also between the said buyers of said corn products receiving said lower discriminatory prices and other buyers not receiving said lower discriminatory prices; and the effect of said discriminations has been, or may be, to injure, destroy or prevent competition in the sale and distribution of corn products between the said respondents and other manufacturers of corn products; and the effect of said discriminations has been, or may be, to injure, destroy and prevent competition in the lines of commerce in which those who purchase from respondents are engaged between the said beneficiaries of said discriminatory prices and said buyers who do not and have not received such beneficial prices.

Wherefore, the Premises Considered, the Federal Trade Commission on this 21st day of October, A. D. 1938, now issues this its complaint against said respondents.

**NOTICE.**

Notice is hereby given you, Corn Products Refining Company and Corn Products Sales Company, Inc., respondents herein, that the 25th day of November, A. D., 1938, at 2 o'clock in the afternoon, is hereby fixed as the time, and



the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

8 You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule VII) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts, which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true, and if in the judgment of the Commission such facts admitted constitute a violation of law or laws as charged in the complaint, to make and serve



*Answer to Complaint.*

findings as to the facts and an order to cease and desist from such violations. Upon application in writing made contemporaneously with the filing of such answer, the respondent, in the discretion of the Commission, may be heard on brief, in oral argument, or both, solely on the question as to whether the facts so admitted constitute the violation or violations of law charged in the complaint.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 21st day of October, A. D. 1938.

By the Commission.

(Seal)

Otis B. Johnson,  
Secretary.

UNITED STATES OF AMERICA  
Before Federal Trade Commission

Filed November 15, 1938

(Caption—Docket No. 3633)

ANSWER OF CORN PRODUCTS REFINING  
COMPANY AND CORN PRODUCTS  
SALES COMPANY

Come now, by their attorney, the Respondents, Corn Products Refining Company and Corn Products Sales Company, reserving the right to dismiss the complaint herein for lack of jurisdiction, and for answer to the complaint of the Federal Trade Commission in the above entitled matter, aver as follows:

1. Answering Paragraph One of the complaint, these Respondents admit the allegations contained therein.

2. Answering Paragraph Two of the complaint, these Respondents admit that the Corn Products Refining Company has an authorized capital stock of \$100,000,000; that it owns and operates plants at Pekin and Argo, Illinois; North Kansas City, Missouri; and Edgewater, New Jersey; that the Argo, Pekin and North Kansas City plants have an aggregate corn grinding capacity of approximately

155,000 bushels per day, with facilities for the finished fabrication of corn products both for household and industrial use, and that one or more of said plants is 10 equipped with carton and can plants and printing establishments for use in producing the packaged products of the Company.

Except as hereinabove set forth, these Respondents deny each and every allegation of Paragraph Two.

3. Answering Paragraph Three of the complaint, these Respondents admit the allegations contained therein.

4. Answering Paragraph Four of the complaint, these Respondents admit the allegations contained therein.

5. Answering Paragraph Five of the complaint, these Respondents admit that they have been and are now selling products derived from corn to some purchasers at a higher delivered price than the delivered prices at which products derived from corn of like grade and quality are sold to other purchasers located at other destinations, but deny that this constitutes discrimination in prices within the prohibition of the Clayton Act (so-called) as amended or the Robinson-Patman Act (so-called) or is otherwise unlawful.

Except as hereinabove set forth, these Respondents deny each and every allegation of Paragraph Five.

6. Answering Paragraph Six of the complaint, these Respondents admit that the delivered prices charged by them are identical as to buyers located at any given point of delivery; that a manufacturer of candy located at St. Joseph, Missouri, paid these Respondents a delivered price of \$3.40 a hundred pounds for a tank car of corn 11 syrup weighing 95,800 pounds net; that a candy manufacturer located at Chicago, Illinois, paid Respondents at approximately the same time \$3.04 a hundred pounds for corn syrup delivered at Chicago, but deny that this constitutes discrimination in prices within the prohibition of the Clayton Act (so-called) as amended or the Robinson-Patman Act (so-called) or is otherwise unlawful.

Except as hereinabove set forth, these Respondents deny each and every allegation of Paragraph Six.

7. Answering Paragraph Seven of the complaint, these Respondents deny each and every allegation of Paragraph Seven.

Further answering, these Respondents say that the manufacture and sale of products derived from corn is a private

*Answer to Complaint.*

business not dedicated to the public use and not affected with public interest, and if Section 2 (a) of the Clayton Act as amended is construed to render unlawful price differentials charged by these Respondents it would constitute an unlawful attempt to fix or regulate prices; that Section 2 of said Act as amended forbids the doing of acts in terms so vague, indefinite and uncertain that it fails to inform Respondents what is lawful or what is unlawful, is a denial of due process of law, and attempts to delegate a legislative power to administrative officials, and is therefore unconstitutional.

12 Wherefore, Respondents pray that the complaint filed against them may be dismissed.

Dated November 15, 1938.

CORN PRODUCTS REFINING COMPANY

Frank H. Hall

By /s/ 17 Battery Place NY City

/s/ Parker McCollester

25 Broadway, New York City

CORN PRODUCTS SALES COMPANY :

By /s/ Frank H. Hall

17 Battery Place NY City

/s/ Parker McCollester

25 Broadway, New York City

Their attorneys.



15

UNITED STATES OF AMERICA  
Before Federal Trade Commission

(Caption—Docket No. 3633)

AMENDED COMPLAINT.

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, since June 19, 1936, have violated and are now violating the provisions of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., title 15, sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I.

Paragraph One: Respondent, Corn Products Refining Company, is a corporation organized and existing under the laws of New Jersey with its principal office and place of business at 17 Battery Place in the city and State of New York. Respondent, Corn Products Sales Company, Inc., is a corporation organized under the laws of the State of New Jersey and has its principal office and place of business at 17 Battery Place, city and State of New York. Respondent, Corn Products Sales Company, Inc., is a wholly owned sales subsidiary of respondent Corn Products Refining Company, through which products manufactured by Corn Products Refining Company are sold and distributed. Corn Products Refining Company owns the entire capital stock of Corn Products Sales Company, Inc. and controls and directs Corn Products Sales Company, Inc.

Paragraph Two: Respondent, Corn Products Refining Company, has an authorized capital stock of \$100,000,000. Corn Products Refining Company owns and operates plants at Pekin and Argo, Illinois; North Kansas City, Missouri; and Edgewater, New Jersey. The Argo, Pekin and North Kansas City plants have a corn grinding capacity in excess of 155,000 bushels per day, with complete facilities for the finished fabrication of all known corn starch products, both for household and industrial use, and including well equipped carton and can plants and printing establishments



for use in producing the many packaged products of the company. The Edgewater plant has a reserve corn grinding capacity of 30,000 bushels daily. Respondents grind of corn approximates that of all of its competitors combined.

16 Paragraph Three: For many years respondents have been and are now engaged in the business of manufacturing, selling and distributing in interstate commerce products derived from corn. The principal products derived from corn are (1) Starch, both for food and other purposes; (2) Glucose or Corn Syrup; and (3) Corn sugar. Starch is first manufactured from the corn, and glucose and grape sugar are made by treating the starch with certain acids, the resulting solid product being sugar and the resulting syrup being glucose. Glucose is largely used in the manufacture of candy, jellies, jams, preserves, and the like as well as in the mixing of syrups.

The principal by-products of corn resulting in the corn products business are gluten feed, corn oil, corn-oil cake and corn-oil meal.

The Corn Products Refining Company, in addition to bulk products, produces the following branded products:

Kingsford and Duryea Starches, Karo Syrup, Mazola Oil, Argo Corn Starch, Argo Gloss Starch, Kre-Mel Dessert, Linit and Cerelose.

Paragraph Four: For many years in the course and conduct of their business, the respondents have been and are now manufacturing the aforesaid commodities at the aforesaid plants and have sold and shipped and do now sell and ship such commodities in commerce between and among the various States of the United States from the States in which their factories are located across State lines to purchasers thereof located in States other than the States in which respondents' said plants are located in competition with other persons, firms and corporations engaged in similar lines of commerce.

Paragraph Five: Since June 19, 1936 and while engaged as aforesaid in commerce among the several States of the United States and the District of Columbia, the respondents have been and are now, in the course of such commerce, discriminating in price between purchasers of said commodities of like grade and quality, which commodities are sold for use, consumption or resale within the several States



*Amended Complaint.*

of the United States and the District of Columbia in that the respondents have been and are now selling such commodities to some purchasers at a higher price than the price at which commodities of like grade and quality are sold by respondents to other purchasers generally competitively engaged with the first mentioned purchasers.

Paragraph Six: The effect of said discriminations in price made by said respondents, as set forth in Paragraph Five herein, may be substantially to lessen competition in the sale and distribution of corn products between the said respondents and their competitors; tend to create a monopoly in the line of commerce in which the respondents are engaged; and to injure, destroy, or prevent competition in the sale and distribution of corn products between the said respondents and their competitors.

Paragraph Seven: The effect of said discriminations in price made by said respondents, as set forth in Paragraph Five herein, may be substantially to lessen competition between the buyers of said corn products from respondents receiving said lower discriminatory prices and other buyers from respondents competitively engaged with such favored

buyers who did not receive such favorable prices; tend to create a monopoly in the lines of commerce in which buyers from respondents are engaged; and to injure, destroy, or prevent competition in the lines of commerce in which those who purchase from respondents are engaged between the said beneficiaries of said discriminatory prices and said buyers who do not and have not received such beneficial prices.

Paragraph Eight: The aforesaid acts of respondents constitute a violation of the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., title 15, sec. 13).

**COUNT II.**

The Federal Trade Commission having reason to believe that the party respondents named in the caption hereof, and heretofore more particularly designated and described, since June 19, 1936, have violated and are now violating the provisions of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936:

(U. S. C., title 15, sec. 13), hereby issues this its complaint against respondents and states its charges with respect thereto, as follows, to wit:

Paragraph One: For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in Paragraphs One to Four inclusive of Count I of this complaint to the same extent and as though the allegations of said Paragraphs One to Four inclusive of said Count I were set out in full herein, and said Paragraphs One to Four inclusive of said Count I are incorporated herein by reference and made a part of the allegations of this count.

Paragraph Two: Respondents have entered into advertising arrangements with certain of their purchasers, to wit, Curtiss Candy Company of Chicago, Illinois, and the Bachman Chocolate Manufacturing Company of Mount Joy, Pennsylvania of dextrose, as a result of which large sums of money have been spent by them since June 19, 1936 in cooperatively advertising with such purchasers the dextrose so purchased and the respondents have not accorded such services or facilities to other of their purchasers competitively engaged with the aforementioned purchasers on proportionally equal terms.

Paragraph Three: Since June 19, 1936, in the course and conduct of their business described in Paragraphs One to Four inclusive of Count I hereof, respondents have discriminated and are discriminating in favor of certain purchasers against other purchasers of corn products bought for resale by contracting to furnish or furnishing, or by contributing to the furnishing of, services and facilities connected with the offering for sale, of such commodity so purchased upon terms not accorded all purchasers on proportionally equal terms.

Paragraph Four: The aforesaid acts of respondents constitute a violation of Section 2 (c) of the above mentioned Act of Congress.

The Federal Trade Commission having reason to believe that the party respondents named in the caption hereof, and heretofore more particularly designated and described, have violated and are now violating the provisions of Section 3 of the Act of Congress entitled "An Act

to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, (The Clayton Act), hereby issues this its complaint against respondents and states its charges with respect thereto as follows, to wit:

Paragraph One: For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in Paragraphs One to Four inclusive of Count I of this complaint to the same extent and as though the allegations of said Paragraphs One to Four inclusive of said Count I were set out in full herein, and said Paragraphs One to Four inclusive of said Count I are incorporated herein by reference and made a part of the allegations of this count.

Paragraph Two: That the respondents, for several years last past, in the course of interstate commerce, have sold to and made contracts for sale of large quantities of corn starch with the Keever Starch Company of Columbus, Ohio and the Huron Milling Company of Harbor Beach, Michigan, for use, consumption and resale within the United States and the District of Columbia, and have fixed and are now fixing the price charged therefor on the condition, agreement and understanding that the purchasers thereof shall not use the goods, wares, merchandise, supplies or other commodities of a competitor or competitors of respondents, and that the effect of such sales and contracts of sale or conditions and agreements and understandings may be to substantially lessen competition between respondents and their competitors; and to tend to create a monopoly in respondents in the sale and distribution of corn starch in commerce between and among the various States of the United States and in the District of Columbia.

Paragraph Three: The aforesaid acts of respondents constitute a violation of the provisions of Section 3 of the hereinabove mentioned Act of Congress.

Wherefore, the premises considered, the Federal Trade Commission on this 25th day of March, A. D., 1939, now issues this its complaint against Corn Products Refining Company and Corn Products Sales Company, Inc., stating its charges as hereinabove set out.

#### NOTICE.

Notice is hereby given you, Corn Products Refining Company, and Corn Products Sales Company, Inc., respondents

herein, that the 28th day of April, A. D., 1939 at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the city of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

19 You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule VII) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

. . . . .

Failure of the respondent to file answer within the time above provided and failure to appear at the time **and place fixed for hearing** shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearings on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true, and if in the judgment of the Commission such facts admitted constitute a violation of law



*Answer to Amended Complaint.*

or laws as charged in the complaint, to make and serve findings as to the facts and an order to cease and desist from such violations. Upon application in writing made contemporaneously with the filing of such answer, the respondent, in the discretion of the Commission, may be heard on brief; in oral argument, or both, solely on the question as to whether the facts so admitted constitute the violation or violations of law charged in the complaint.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 25th day of March, A. D. 1939.

By the Commission.

(Seal)

Otis B. Johnson,  
*Secretary.*

UNITED STATES OF AMERICA  
Before Federal Trade Commission  
Filed April 18, 1939

• • (Caption—Docket No. 3633) • •

ANSWER OF CORN PRODUCTS REFINING  
COMPANY AND CORN PRODUCTS  
SALES COMPANY, INC.

Come now, by their attorneys, Respondents, Corn Products Refining Company and Corn Products Sales Company, Inc., reserving the right to dismiss the complaint herein for lack of jurisdiction, and for answer to the amended complaint of the Federal Trade Commission in the above entitled matter, aver as follows:

FOR AN ANSWER TO COUNT I.

1. Answering Paragraph One of Count I of the amended complaint, these Respondents admit the allegations contained therein.

2. Answering Paragraph Two of Count I of the amended complaint, these Respondents admit that the Corn Products Refining Company has an authorized capital stock of \$100,000,000; that it owns and operates plants at Pekin and Argo, Illinois; North Kansas City, Missouri; and Edgewater,

New Jersey; that the Argo, Pekin and North Kansas  
21 City plants have an aggregate corn grinding capacity  
of approximately 155,000 bushels per day with facilities  
for finished fabrication of corn products both for household  
and industrial use, and that one or more of said plants is  
equipped with carton and can plants and printing establish-  
ments for use in producing the packaged products of the  
Company.

Except as hereinabove set forth, these Respondents deny  
each and every allegation of Paragraph Two of the amended  
complaint.

3. Answering Paragraph Three of Count I of the  
amended complaint, these Respondents admit the allega-  
tions contained therein.

4. Answering Paragraph Four of Count I of the  
amended complaint, these respondents admit the allega-  
tions contained therein.

5. Answering Paragraph Five of Count I of the amended  
complaint:

These Respondents admit that they have been and now  
are selling products derived from corn to some purchasers  
at higher delivered prices than the delivered prices at which  
products derived from corn of like grade and quality are  
sold to other purchasers located at other destinations; but

22 deny that this in any instance constitutes discrimina-  
tion in prices within the prohibition of the Clayton Act  
(so-called) as amended, or the Robinson-Patman Act  
(so-called), or is otherwise unlawful.

These Respondents further admit that they have been  
and now are selling products derived from corn to the Rum-  
ford Baking Powder Company, Allied Mills, Inc., Coopera-  
tive G. L. F. Mills, Inc., Calumet Baking Powder Company,  
R. B. Davis Baking Powder Company, Stein-Hall Manu-  
facturing Company, Marshfield Milling Company, E. W.  
Bailey & Company, J. C. Stewart Company, Farley Feed  
Company, Huron Milling Company and Keever Starch  
Company at lower prices than the prices at which products  
derived from corn of like grade and quality are sold to  
other purchasers, but deny that this constitutes discrimina-  
tion in prices within the prohibition of the Clayton Act  
(so-called) as amended or the Robinson-Patman Act (so-  
called), or is otherwise unlawful.

Except as hereinabove set forth, these Respondents deny  
each and every allegation of Paragraph Five of Count I of  
the amended complaint.



6. Answering Paragraph Six of Count I of the amended complaint, these Respondents deny each and every allegation contained therein.

7. Answering Paragraph Seven of Count I of the  
23 amended complaint, these Respondents deny each and every allegation contained therein.

8. Answering Paragraph Eight of Count I of the amended complaint, these Respondents deny each and every allegation contained therein.

FOR AN ANSWER TO COUNT II.

9. Answering Paragraph One of Count II of the amended complaint, Respondents repeat, reiterate and reallege with the same force and effect as if herein set forth at length, the admissions and denials in Paragraphs 1 to 4, inclusive, of this amended answer.

10. Answering Paragraph Two of Count II of the amended complaint:

Respondents admit that they have entered into advertising arrangements with Curtiss Candy Company of Chicago, Illinois and the Bachman Chocolate Manufacturing Company of Mt. Joy, Pennsylvania, as a result of which sums of money have been spent by Respondents since June 19, 1936, in advertising dextrose, one of Respondents' commodities, cooperatively with the advertisement by said Curtiss Candy Company and said Bachman Candy Manufacturing Company of the products of said Companies.

Respondents deny each and every other allegation contained in Paragraph Two of Count II of the amended  
24 complaint.

11. Answering Paragraph Three of Count II of the amended complaint, Respondents deny each and every allegation contained therein.

12. Answering Paragraph Four of Count II of the amended complaint, Respondents deny each and every allegation contained therein.

FOR AN ANSWER TO COUNT III.

13. Answering Paragraph One of Count III of the amended complaint, Respondents repeat, reiterate and reallege with the same force and effect as if herein set forth at length, the admissions and denials in Paragraphs 1 to 4, inclusive, of this amended answer.

14. Answering Paragraph Two of Count III of the amended complaint:

Respondents admit that pursuant to a contract with Huron Milling Company, dated the 21st day of April, 1927, Respondent Corn Products Refining Company has manufactured for said Huron Milling Company thin boiling pearl, chlorinated and other special starches, including Hercules Gum, up to a maximum of 30,000,000 pounds per year, and of thick boiling pearl and powdered cornstarches and edible pearl and powdered starches up to a maximum of 20,000,000 pounds per year, but Respondents have no knowledge whether such products are or were intended for use, consumption or resale within the United States or the District of Columbia.

Respondents admit that pursuant to a contract with the Keever Starch Company, dated the 12th day of July, 1932, Respondent Corn Products Refining Company has manufactured for said Keever Starch Company cornstarch products up to a maximum of 20,000,000 pounds per year, but Respondents have no knowledge whether such products are or were intended for use, consumption or resale within the United States or the District of Columbia.

Respondents deny each and every other allegation contained in Paragraph Two of Count III of the amended complaint.

15. Answering Paragraph Three of Count III of the amended complaint, Respondents deny each and every allegation contained therein.

**FOR A SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE  
TO COUNTS I AND II OF THE AMENDED COMPLAINT.**

16. Respondents repeat, reiterate and reallege with the same force and effect as if herein set forth at length, the admissions and denials in Paragraphs 1 to 8, inclusive, of this amended answer.

17. Respondents allege that the manufacture and sale of products derived from corn is a private business not dedicated to the public use and not affected with the public interest, and if Section 2 of the Clayton Act as amended be construed to render unlawful such differences in prices or such discounts as are from time to time made by these Respondents, or such cooperative advertising arrangements as have been made by Respondents, it would

*Answer to Amended Complaint.*

represent an attempt to fix or regulate prices, or to regulate the conduct of a private business, which would constitute a taking of the private property of Respondents for a public use without compensation and would be beyond the authority of the Congress under the "Commerce Clause" of the Constitution; that Section 2 of said Act as amended forbids the doing of acts in terms so vague, indefinite and uncertain that it fails to inform Respondents what is lawful or what is unlawful and, therefore, its attempted enforcement constitutes a denial of due process of law; that said Section 2 represents an attempted delegation of legislative power to administrative officials; and that for all of these reasons Section 2 is unconstitutional and null and void.

27 Wherefore, Respondents pray that the amended complaint filed against them may be dismissed.

Dated, April 17, 1939.

CORN PRODUCTS REFINING COMPANY  
CORN PRODUCTS SALES COMPANY, INC.

/s/ By Frank H. Hall  
Frank H. Hall,  
17 Battery Place,  
New York, N. Y.

/s/ Parker McCollester  
Parker McCollester,  
25 Broadway,  
New York, N. Y.

*Attorneys.*

**CERTIFICATE.**

This is to certify that the attached proceedings, before the Federal Trade Commission in the matter of:

Docket No.—3633

Case Title—Corn Products Refining Company  
Place—New York, New York

Date—December 5, 1938

were had as therein appears, and that this is the original transcript thereof for the files of the Commission.

Ethel E. Fisher & Associates, Inc.  
*Official Reporters*

By D. MacMillan,  
*Assistant Secretary.*

55 BEFORE THE FEDERAL TRADE COMMISSION.

• • (Caption—Docket No. 3633) • •

Room 2303, Federal Court Building, Foley Square, New York, New York, Monday, December 5, 1938.

Met, pursuant to notice at 10:00 o'clock a.m.

Before:

Charles F. Diggs, Trial Examiner.

Appearances:

A. W. DeBirny, Esq., (Washington, D. C.) attorney for the Federal Trade Commission.

Lord, Day & Lord, Esqs., (25 Broadway, New York New York) By

Parker McCollester, Esq., and

Sidney S. Coggan, Esq., of counsel, and

Frank H. Hall, Esq., (17 Battery Place, New York, New York) appearing as counsel for respondents.

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PROCEEDINGS,

Trial Examiner Diggs: Gentlemen, the hearing will come to order. The complaint in this proceeding charges the respondents with a violation of Section 2 of what is commonly known as the Clayton Act, as amended by what is also commonly known as the Robinson-Patman Act.

Anyone desiring a copy of the transcript in this proceeding may secure the same from the official reporter, who is not an employee of the government. He will make known the prices and terms upon application.

You may now proceed, gentlemen.

57 Trial Examiner Diggs: You had something you wanted to present, Mr. DeBirny?

Mr. DeBirny: I think it advisable to state for the record very briefly what we consider the charge to be and what we intend to show.

Trial Examiner Diggs: Well, personally, I have not been able to see any purpose to be served by that but if you want to do so, you may proceed. I think it is a fact that the complaint speaks for itself and I think it is rather encumbering the record with an unnecessary matter.

Mr. DeBirny: In order that there may be no misunderstanding as to the complaint or any surprise on the part of the respondents I think I will state that the respondent,



Corn Products Refining Company and its selling subsidiary, Corn Products Sales Company have been charged by the Federal Trade Commission as violators of Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act.

These corporations have their principal place of business in New York City and are engaged in the production, sale, and distribution of products obtained by the refining of corn.

The Commission charges that in the course of interstate commerce these corporations have discriminated in price between purchasers of goods of like grade and quality by selling to some purchasers at a higher price than the  
58 price charged other purchasers.

The Commission expects to prove that secret contracts for the sale of goods at discriminatory prices have been followed by Corn Products Refining Company and its subsidiary and that additionally and generally these corporations have practiced price discrimination through the employment of an artificial delivered price system.

The Commission expects to show that while this dominant corporation pursued a policy and practice openly it, at the same time, secretly deviated from its general practice and by the use of discriminatory prices not involving the artificial delivered price system secured contracts for as long as fifteen years from a number of the largest buyers using hundreds of millions of pounds of corn products annually.

The Commission asserts that while openly, generally selling on an artificially delivered price basis which did not reflect true transportation costs it substantially eliminated competition in the primary line it at the same time and by the same transactions so injured competition in the lines of commerce in which its customers are engaged as to concentrate, for example, the candy industry in Chicago and eliminate (illegible) candy in every state west of the Mississippi and injure many confectionery manufacturers east of the Mississippi.

Mr. Hall: May I ask if you have inadvertently  
59 omitted that it is charged that all of these transactions have occurred since the time June 19, 1936?

Mr. DeBirny: That is right.

Mr. McColester: Mr. Examiner,—

Mr. DeBirny (interposing): These sales and transactions which we charge are violations of the law have occurred since June 19, 1936.

Mr. McCollester: Mr. Examiner, I think that I should make this remark on the record:

The complaint filed in this proceeding to which we have made answer is a complaint in very general terms which practically alleges the statute without any specific indications of a violation except in general terms, in the terms of the statute, itself, with one exception and that is: that, in paragraph 6 it is stated, by way of explanation of paragraph 5, paragraph 5 being a paragraph that makes the general allegation in the terms of the statute itself; in paragraph 6, it states that the discriminations alleged in paragraph 5 are generally affected through the employment of delivered prices. And, then, an example is given.

Under those circumstances in the state of the record, I think that we are prepared to agree that there is put in issue here by the complaint the question of whether there have been discriminations in prices through the employment of delivered prices; but, we have not, until this moment here, heard of any claim on the part of the Federal Trade Commission that there were discriminations accomplished through the employment of secret contracts.

It seems to me, therefore, that before we are compelled to respond to any allegations that there have been discriminations as a result of secret contracts we are entitled to expect from counsel for the Federal Trade Commission a statement as to what contracts are alleged to be secret and what contracts are alleged to produce the discrimination.

Trial Examiner Diggs: In other words, you think that they should disclose their evidence to you.

Mr. McCollester: No, I do not, Mr. Examiner, but I think that we ought to be put on notice; I think they ought to put us on notice, very definitely as to what the violations of law are that we are called upon here to be defended against.

Mr. DeBirny: Mr. Examiner—

Trial Examiner Diggs (interposing): One moment, is that all that you have to present, Mr. McCollester?

Mr. McCollester: Yes, Mr. Examiner.

Trial Examiner Diggs: Now, as I have stated before this is a situation that we find ourselves now in which is just the situation I felt was likely to occur when we attempted to do what has been done here; that is, to make an opening statement.



61 As I stated in the beginning, an opening statement, in my view, of any sort, can serve no useful purpose. You cannot enlarge your complaint by it; you cannot restrict the boundaries of your complaint by it.

Now, as you point out, you stand on the complaint as it is drawn and as you met it by your answer, and any statement by counsel as to what he intends to do or does not intend to do here certainly cannot add to, take from or alter anything that is in the complaint.

Now, where we find ourselves in that situation, we have simply, as I said before, got ourselves in a situation where we are answering ourselves by reason of this opening statement, and it is an action which I have not believed in the past and I do not believe in now.

Mr. McCollester: I think, Mr. Examiner, I quite agree with your position in that regard and I also think in view of the complaint as drawn and as served upon us and as answered by us here we are entitled; since we are, of course, entitled to reasonable notice as to what we are called upon to answer, we are entitled to assume that there is no allegation of secret contracts which we are bound to meet in this proceeding.

Trial Examiner Diggs: Of course, that is a point that I am not called upon to pass upon in this proceeding now.

Mr. McCollester: Perhaps not, I would not want  
62 to say either way on that now, but I do want to make my position clear on the record.

Mr. DeBirny: I have made this opening statement for the specific purpose of preventing any claim, under the complaint, of surprise by the respondents when we begin to offer our evidence. Has the witness been sworn?

Trial Examiner Diggs: No. I do not even know who the witness is. Is this the witness here?

Mr. DeBirny: Yes, Mr. Examiner.

JOHN D. BUHRER, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

*Direct Examination by Mr. DeBirny.*

Q. Will you state your name please?

A. John D. Buhrer, B-u-h-r-e-r.

Trial Examiner Diggs: D-u-h?

The Witness: B. B-u-h-r-e-r.-

By Mr. DeBirny:

Q. Mr. Buhrer, will you state what position you hold with Corn Products Refining Company?

A. I am a Vice-President, in charge of sales.

Q. Do you hold any other office?

A. I am a director of the company.

Q. Anything else?

63 A. In the Corn Products Refining Company, no.

Q. Do you hold any position with the Corn Products Sales Company?

A. I am president, of the Corn Products Sales Company, and also a director.

Q. For how many years have you been associated with Corn Products Refining Company?

A. About thirty-one years.

Q. Will you give us a little indication of the positions that you have had with that company?

A. I was first employed as a specialty salesman, calling on the retail grocery trade. Later I entered the feed department in Chicago.

Then I was transferred back to what we call the specialty department, the package goods department. I was in charge of the Southern territory. Then the Eastern territory was included in my department, then the entire United States; and later the bulk goods was given to me.

Q. As vice-president in charge of sales, did you say?

A. Yes.

Q. What are your duties?

A. Well, my principal duties are sales promotion, in charge of advertising, organization,—well, I would say those are the principal duties, and then executive work.

I would say that was the principal duties.

64 Q. Can you state, Mr. Buhrer, the names of the officials of Corn Products Refining Company, and the positions that they occupy?

A. Yes, I think I can.

Q. Would you do so, please?

A. Mr. George M. Moffett is the president, Mr. George S. Mahana is a vice-president, Mr. F. T. Fisher is a vice-president.

Do you want me to state their position, or what they are in charge of?

Q. If you would, I would prefer it that way.

A. All right, I will go back.

Mr. George M. Moffett is president and chief executive, Mr. George S. Mahana is in charge of our foreign business, F. T. Fisher is secretary and treasurer, in addition to being vice-president. Morris Sayre is in charge of manufacturing. He is a vice-president and in charge of manufacturing. Mr. C. L. Campbell is in charge of purchasing.

Mr. Hall: He is vice-president, vice-president in charge of purchasing.

The Witness: Yes. Do you want the junior officers, too?  
By Mr. DeBirny:

Q. That is right. Yes, sir.

A. I don't know whether I can give them all or not.

W. D. Braidwood is assistant treasurer. Then Mr. 65 W. D. Post is—I think he is one of the assistant secretaries, but we pay so little attention to titles that I am not certain.

Q. That is all right, what are Mr. Post's duties?

A. Well, Mr. Post is in charge of personnel, he is in the accounting department. I couldn't tell you exactly what he does.

Q. Now, you said that Mr. Moffett was president of the Corporation?

A. Yes, sir.

Q. Functioning within the Corn Products Refining Company do you have committees?

A. Yes, we do.

Q. You have committees?

A. Yes, sir.

Q. Will you state what committees there are?

A. We have an advisory committee, in addition to the Board of Directors.

We have an advisory committee which is composed of the president, the vice-presidents, and Mr. Frank Hall, counsel, and Mr. Linus Coggan, counsel, and Mr. Walter Moran, secretary.

Q. That is the advisory committee?

A. Yes, sir.

Q. What other committees are there?

A. We have a merchandising committee. The mer- 66  
chandising committee is composed of—I am the chairman and Mr. C. L. Campbell—I referred to him before, do you want his title?

Q. No.

A. And Mr. Walter Dircks, who is an assistant to Mr. Mahana, and Mr. Butler who is assistant to Mr. Sayre. Also Mr. Rex Walden, who is in charge of the feed department, and Mr. Reick who is one of the—one of his assistants, and Mr. Kayhart, who is another of his assistants. Also Mr. Eddie Von Bergen, who is the credit manager, and Mr. Frank Himschoot, and Mr. William Gamble, who are my assistants in the package department. Then Mr. Fred Mueller, who is in charge of bulk sales. He is my assistant in charge of bulk sales.

Q. Does Mr. Gamble or Mr. Himschoot head the package department?

A. Yes.

Q. Which one?

A. Well, they divide the country. Mr. Himschoot has the east and south, and Mr. Gamble has the western territory, that is from Pittsburgh on.

Q. Does that committee have a secretary?

A. Mr. Kayhart acts as the secretary.

67 Q. What other committees are there?

A. We have an advertising committee.

Q. An advertising committee?

A. Yes.

Q. Who is on that?

A. I am chairman of the advertising committee. Messrs. Gamble, Himschoot, Reick, Mr. Mueller, and E. W. Hellwig. That comprises that committee.

Mr. Hellwig is not an employee of the Corn Products Refining Company. He is the head of our agency, advertising agency.

Q. What other committees are there?

A. We have salary committees.

Q. For the employees' salaries, you mean?

A. Yes.

Q. You can pass that up. What other committees?

A. Personnel committees.

Q. I don't care about those.

A. Products development committee.

Q. What are the purposes of that committee?

A. Well, it is to discuss new products, the application of new products.

Q. As related to sales?

A. Well, no. It doesn't get to sales. It is before sales.

Q. Well, I don't care about that then.  
68 What other committees have you?

A. There are various other committees that I am not familiar with.

Q. Do you serve on any other committees?

A. No, I don't.

Q. Do you have in mind any other committees?

A. Yes, there is a production committee.

That production committee decides on how much of various products should be manufactured that month, or for a period.

Q. Are any members of your staff in—are any members of your staff in the merchandising end of that committee?

A. On the production committee? Yes, I think Mr. Himschoot is on that committee.

Q. Do you have in mind any other committees?

A. I can't think of any others at the moment.

Q. Who is secretary of the advertising committee?

A. Mr. Reick.

Trial Examiner Diggs: All of these persons you have named on committees and officers; they are all—they all have to do with the set-up of Corn Products Refining Company; is that right?

The Witness: Well, the Sales Company is the company that does the selling, and I would say that the advertising came under the Sales Company. The merchandising  
69 I would say, came under the Sales Company. The advisory committee is the Refining Company.

Trial Examiner Diggs: Any other exceptions, except the two you mentioned?

The Witness: No.

Trial Examiner Diggs: The rest belong to the Refining Company, do all the rest of them belong to the Refining Company?

The Witness: I would say just merchandising and advertising belong to the Sales Company. I think that is the only two.

By Mr. DeBirny:

Q. Is any distinction made as to whether the employees are employees of the Sales Company or of the Refining Company?

A. Oh, yes.

Q. As to these employees you have mentioned, I mean.

A. Not so much there as in the field. In the field they are mostly all Sales Company.



Q. Are these people construed as employees of the Refining Company?

A. Yes.

Q. All of them?

A. Yes.

70 Trial Examiner Diggs: By that, you mean then, the two exceptions you mentioned, too?

The Witness: Those men, I would say, are employees of the Refining Company. All of the men I have mentioned I would say are employees of the Refining Company.

71 By Mr. DeBirny:

Q. How long have you held those positions as chairman of the merchandising committee and of the advertising committee?

A. I think about five years for the merchandising committee. The advertising committee, very much longer.

Q. For how many years have you been a director of the company?

A. I would guess about twelve years.

Q. Are the conclusions which are arrived at by the merchandising committee required to be submitted to any other committee or official of the company for approval?

A. Any unusual act or contract, or policy, or expenditure would have to be referred to the advisory committee. Routine would not.

72 Q. You are a member of the Advisory Committee?

A. Yes, sir, I am.

Q. Are the decisions of the Advisory Committee final?

A. Some of their decisions have to be confirmed by the Board of Directors.

Q. What are the nature of those matters?

A. Well, appropriations. I might say again, that any unusual recommendation that involved change of policy, or considerable expenditure, we would not hesitate to refer such to the Board of Directors.

Q. Do you know whether any contracts for the sale of merchandise by Corn Products Refining Company, or its subsidiary, have been referred to the Advisory Committee?

A. When do you mean, recently?

Q. Any contracts under which you have sold since June 19, 1936?

A. Well, I don't recall any offhand.

Q. I don't mean that they were referred to the Advisory Committee since June 19, 1936?

A. I understand. Any that came up since 1936.

Q. What did you say?

A. Any of them that came up since 1936, is that what you mean?

Q. No. Any that you are selling under at the present time, or since June 19, 1936?

73 A. That originated in the Merchandising Committee?

Q. That originated anywhere?

A. And that came to the Advisory Committee?

Q. That is right.

A. You are asking if I know of any contract that the Advisory Committee passed on.

Q. That is right.

A. Well, we discussed so many things, I couldn't answer that question intelligently.

Q. You have no contract in mind?

A. I have a feed contract in mind, but that is practically out now.

Q. What do you mean?

A. It is expired.

Q. When did it expire?

A. It expires at the end of this year.

Q. It has not expired yet?

A. This month it expires.

Q. Do you have any contracts in mind for the sale of starch?

Mr. Hall: You refer to contracts that came before the Advisory Committee?

Mr. DeBirny: Yes.

Trial Examiner Diggs: What is that?

Mr. Hall: I asked him if he referred to contracts that came before the Advisory Committee.

Mr. DeBirny: Yes.

Mr. Hall: I thought that was what the question was limited to.

Mr. McColester: Mr. Examiner, I confess I do not see the relevancy of this question, and I must interpose an objection on the ground that it is not material to any of the issues, whether any particular contract was or was not referred to the Advisory Committee. That is a matter entirely within the organization of the company.

75 Trial Examiner Diggs: I am going to overrule the objection, for the reason that as the matter appears I think counsel for the Commission is entitled to ascertain the person who would be likely to know about these particular

contracts, and it is not so much a question as to the details of the business, as I think the Government is entitled to secure whatever information they can as to the persons who are or may be responsible for the Acts which are charged in the complaint.

You may have an exception to that ruling.

Mr. McCollester: Exception.

76 By Mr. DeBirny:

Q. Mr. Buhrer, do you have any knowledge of the Keever or Huron contracts being submitted to the Advisory Committee?

A. I don't recall that they were submitted. I presume they were, but only for confirmation.

Q. Were those such contracts as would have to be submitted then to the Board of Directors?

A. I doubt if they were submitted to the Board of Directors.

Q. Who would know about that?

A. Mr. Hall.

Q. Would the minutes of the Committee show that?

A. Of the Advisory Committee?

Q. Yes.

A. If they were submitted to the Advisory Committee they would show, yes.

Q. Would the minutes of the Merchandising Committee show?

A. That never entered the Merchandising Committee.

Q. Why didn't those contracts enter the Merchandising Committee?

A. Well, I don't regard them as sales contracts. We don't call Huron and Keever customers, we don't regard them as customers.

Q. You mean the Corn Products Refining Company or Corn Products Sales Company does not so regard them?

A. Neither company. We never call on them and never solicit their business. They are competitors.

77 Q. Why don't you call on them?

A. Well, we couldn't—we couldn't increase our business by calling on them. I regard them as competitors.

Q. You sell to them, though, millions of pounds of goods?

A. We—you might say we process for them, but they are not customers of ours. They are not on our customer list.

Q. Are all of your customers on your customer list?

A. Well, I would assume that they are.

Q. Who would know?

A. Several men in our organization.

Q. Specifically, who?

A. Mr. Mueller would know some of them. Mr. Campbell would know some of them, and Mr. Himschoot would know some, and then their assistants probably would be better informed about that.

Q. Is there a processing committee?

A. Well, I don't now just what you mean there.

Q. What committee would contracts of that nature be referred to?

A. I presume a special committee.

Q. Who would create the special committee?

A. I think that is a manufacturing matter; which would come before Mr. Sayre.

Q. Who?

A. Before Mr. Sayre.

78 Q. How many subsidiary corporations are there of Corn Products Refining Company?

A. You are talking about in the United States?

Q. Yes.

A. Well, Corn Products Sales Company. Also Woffard Syrup Company of Houston, Texas, and the Hummel Down-  
ing Company of Milwaukee. There is Crystal Car Line, I don't know whether it is still in existence.  
That is all I can think of at the moment.

Q. What about the Independent Starch Company?

A. It is not in existence.

Q. Is the National Starch Company in existence?

A. No. It may be in existence legally, but it is not functioning.

Q. What about the New England Starch Company?

A. New England Grain Company, yes.

Trial Examiner Diggs: What do you mean by that?

The Witness: I mean, we may have retained the name, but it is not functioning.

By Mr. DeBirny:

Q. Do you mean that you have acquired the assets of those corporations, and that is why they are no longer in existence?

A. I could not answer the question. I am not familiar with just how they went out of existence, or just what its status is today.

79 Q. I see. Do you sell to any of these subsidiary corporations, that is, does Corn Products Refining Com-

pany or Corn Products Sale Company sell to any of these subsidiary corporations?

A. Corn Products Sales Company sells to Woffard Syrup Company a few tanks of glucose a year. We sell to the New England Grain Company some seed.

Q. Is the National Adhesive Corporation a subsidiary?

A. A subsidiary, no, sir.

Q. Do any of the officials of your company hold offices in the National Adhesive Corporation?

A. Mr. Fred Mueller is a director.

Q. Is Allied Mills a subsidiary?

A. No, sir.

Q. Do you have an office in Allied Mills?

A. I am a director of Allied Mills.

Q. As a director of Allied Mills what are your duties?

A. Just to attend directors' meetings and contribute what I can.

Q. And Corn Products Refining Company sells to Allied Mills?

A. Yes, they are one of our customers. They buy from our competitors also.

Q. The same way with National Adhesive Corporation, they buy from Corn Products Refining Company?

A. They buy some from us, and some from competitors.

80. Q. With regard to Resinox, do you sell to them?

A. They use none of our products.

Q. Now, does Corn Products Sales Company make all sales of goods produced by Corn Products Refining Company?

A. No.

Q. Who makes sales of the other goods?

A. Corn Products Refining Company.

Q. What classes of sales does Corn Products Refining Company make?

A. In states where we are chartered we operate under Corn Products Refining Company.

Q. Do you know what states those are?

A. I think in New York State and in Illinois we operate under the Refining Company, although the sales company also sells there because we carry—I don't know just what is the reason. Both companies are located and sell in those territories.



Most of our sales offices are Corn Products Sales Company, and I think that most of our retail men, our salesmen, are paid by the Sales Company.

Q. Why are not all sales in states like Illinois and New York put through the Sales Company?

A. Well, there is a technical reason, that is all.

Q. What is that?

A. I am not familiar enough to answer that question intelligently.

Q. Who knows?

A. I think our Legal Department can explain that.

Q. Do you mean a technical, manufacturing, or tax reason, or what?

A. Well, there are legal reasons and tax reasons and the location of the plants.

Q. Now, that applies only to the states where there are peculiar tax problems?

A. I would not say that, no.

Trial Examiner Diggs: I want to ask a question. You said, depending on the location of the plants. Location, with reference to what?

The Witness: Well, when a plant is located in Illinois we have to have a license in that state, and the same is true in New Jersey, and we naturally maintain an office in that state, under the Refining Company.

By Mr. DeBirny:

Q. Where are your manufacturing plants located?

A. Our principal plant is located at Argo, Illinois.

Q. Where are the others located?

A. We have others located at Pekin, Illinois, Kansas City, Missouri, and Edgewater, New Jersey.

Q. Where do you maintain warehouses?

A. Well, I should say we have about two hundred  
82 consignment points.

Q. What do you mean by consignment points?

A. Where we carry consigned stock, where we not necessarily operate a warehouse but where we use warehouses.

Q. Do you operate warehouses anywhere?

A. Yes, we operate a warehouse in Philadelphia and one in Boston.

Q. Where are the goods manufactured that you sell in Philadelphia and Boston?

A. Speaking of what goods?

Q. Of the goods that you sell.

A. You mean starch and glucose?

Q. I will pass that question for the moment.

The sales of your company, are they divided as to bulk goods and package goods.

A. Oh, yes, and then subdivided.

Q. With reference to the bulk goods, do you warehouse them at Philadelphia and Boston?

A. Yes, sir.

Q. Where are they manufactured?

A. Probably at Argo, depending on our convenience and our ability to supply at our various factories.

Q. Who would know where they were manufactured?

A. Well, I know that sometimes we ship from Edgewater and sometimes ship from Argo, and I presume at times  
83 we ship from Kansas City.

Q. Do you mean that the bulk of the goods are manufactured at Argo?

A. Yes, it is our main or principal plant.

Q. Does that necessarily mean that Philadelphia and Boston would receive their products from Argo?

A. I think probably ninety per cent of the time they receive their products from Argo.

Q. Do you know definitely the names of any of the customers that Corn Products Refining Company sells directly to at other prices than the regular and customary published prices?

A. I cannot recall any customers that we are making any special price to.

Q. In addition to the committees that you have mentioned, is there a transportation committee?

A. I am not aware of any. There are not enough men to make a committee, our transportation is handled by Mr. Gantt and Mr. Bingham.

Q. What office does Mr. Gantt hold in the Corporation?

A. Mr. Gantt is in charge of the manufacturing of package goods, and he is also our traffic manager.

Q. In New York and vicinity and in Boston and vicinity are there any customers who take in tank car deliveries?

A. Yes.

Q. Do you know the names of them?

84 A. Well—

Mr. McColléster: Before you give the names, you are asked first whether you know.

The Witness: I know we ship tank cars into the two territories.

By Mr. DeBirny:

Q. I asked you if you knew the names of the companies that received the tank cars.

A. Well, I am not as well qualified to answer that question as others might be.

Q. Who is better qualified to answer that?

A. I would say Mr. Fred Mueller could give you that information.

Q. But, do you have in your mind the names of companies receiving glucose in tank car lots?

A. I know of one in Boston, or in the Boston Territory. I know of one, that would be the E. D. Lewis Company, but I am not familiar with the bulk customers.

Q. When you sell your bulk products how do you determine the prices?

A. It is a build up price starting with Chicago and adding freight, published freight.

Q. Do I understand that to every point where you ship these products you take a Chicago factory price and add to it the published freight for that commodity to the point of destination?

85 A. That is substantially correct.

Q. Are there any deviations from that practice?

A. None that I am aware of.

Q. When you sell packages, what system do you use?

A. We have a zone system.

Q. What do you mean by a zone system?

86 A. Well, we divide the country into zones, and in those zones we have one price.

Q. How many zones is the country divided into?

A. I couldn't tell you at this time. I am not familiar with all of those things because I have not gone into them for a good many years.

Q. Would Mr. Mueller know more about that?

A. Mr. Mueller would not know anything about packages.

Q. Who would be the man best—

A. (Interposing.) Well, the man in charge of package goods. I would say Mr. Gamble and Mr. Himschoot.

Q. Why are the two systems used in the merchandising of the goods?

A. Well, one reason, you see, bulk products are sold to consumers and your packages are sold to distributors. It is entirely different.

Q. How does that affect the matter?

A. I can give you an example, if that will answer your question.

Q. I simply want your idea, if you care to give it.

A. Well, on packages, it is necessary to have all of your distributors have the same price, because otherwise the one who was located in the most advantageous freight point would have a tremendous advantage over his competitors, you see. So in zoning the country we are enabled to  
87 give all of our distributors an equal opportunity at the same price.

Freight rates are not equitable when you get to small points, and there are many jobbers in small points that compete with jobbers in the large cities, and they would just be put out of business if it wasn't for us putting them in a zone at the same price as a large city.

Trial Examiner Diggs: Is that all of your answer?

The Witness: Yes.

Trial Examiner Diggs: You used the word consumers just now, by that do you mean, sold to the ultimate consumers?

The Witness: I meant by that, that they consume the products and change in form.

By Mr. DeBirny:

Q. You refer to situations such as a confectionery?

A. Yes, a manufacturer who is a consumer of our products.

Q. How many cents do those zones vary,—in percentages I guess we had better put it?

A. I would be guessing, I couldn't give you the actual facts on that.

Q. Do you have charts to show that?

A. Yes.

Q. Does the published freight which is added to the price of the bulk goods at Chicago ever equal—I withdraw that.

88 Does the freight which is added to the price of the goods at Chicago on bulk products represent the true price paid?

A. I don't think it does, always.

Q. Does it ever equal the true price paid?

Mr. McCollester: By paid, you mean on the particular out-bound shipment?

Mr. DeBirny: Yes, on the particular out-bound shipment.

The Witness: Again, I have no detailed knowledge of that.

By Mr. DeBirny:

Q. Who would know that?

A. Our traffic department.

Q. With reference to the cars in which you ship glucose, are those the cars operated by the Crystal Car Line?

A. Some of them, and sometimes we rent cars.

Q. Who do you rent cars from?

A. Why, we rent them from the General American Tank Car Company. I don't know of any others at the moment.

Q. I see. When a customer buys in tank car lots, do you rent the cars to the customer?

Mr. McColester: Do you know what the arrangement is?

The Witness: I cannot tell you, that is a technical matter, that I don't know much about.

89 By Mr. DeBirny:

Q. That would come under the transportation department?

A. Yes, and probably under bulk sales.

Q. When the price of bulk products changes, are the customers given an opportunity to buy at the former price, if it is the lower price?

A. Yes.

Q. Invariably?

A. Always.

Q. How many days does that option last?

A. It lasts five days, today. At this time, I mean.

Q. When did it differ?

A. At one time it was ten days.

Q. How long was that prior to June 19, 1936?

A. I think in 1936 we gave them ten days.

Q. You gave them ten days during 1936?

A. I think so.

Q. Who would know?

A. We would have to consult our records.

Q. Are those records in your possession?

A. They are in the sales department.

Q. Would the minutes of the Merchandising Committee disclose that?

A. No, I think not.

Q. Those records are in your possession, then?

90 A. I think we have them.

Q. When a purchase of bulk products has been—



**Trial Examiner Diggs:** May I interrupt right there?

Was that privilege of purchasing at the lower price extended to all customers indiscriminately?

**The Witness:** Absolutely, every customer is permitted to book at the old price and specify within the five or ten day period, whichever we had in operation.

The purpose is to place all customers on the same price level. Otherwise some would have a great advantage over others.

**By Mr. DeBirny:**

**Q.** After the five or ten day period—after the expiration of the five or ten day period are any exceptions ever granted to customers?

**A.** Sometimes they take them, and if they are delayed in getting in their specifications they usually submit some reason which they think is all right, and we try to avoid quarrelling with our customers.

91 **Q.** Is that a frequent practice of the—

**A.** Well, I would say that it is a small percentage of our business.

**Q.** In any particular trade is that more prevalent?

**A.** I would say so.

**Q.** What?

**A.** I would say so.

**Q.** Which one?

**A.** I would say the confectionery trade.

**Q.** Do you have in mind customers that habitually engage in that practice?

**A.** There usually—

**Q.** Yes?

**A.** This was the case—this is usually the case—there are certain ones that are offenders but I do not know their names.

**Q.** Who would know?

**A.** I would say Mr. Mueller might name one.

**Q.** Who might name another?

**A.** Mr. Mueller.

**Q.** He is the only one that would?

**A.** Well, he or his assistant.

**Q.** I see.

**A.** Yes.

92 **Q.** Are any package goods sold at a delivered price calculated on Chicago?

**A.** They are all calculated to Chicago to a zone—but you mean to an individual customer?

Q. Exclusive of zones.

A. I do not know of any exclusively of zones—exclusive of zones.

Q. How far in the future are deliveries to be made on purchases?

A. Thirty days—that varies with the products.

Q. What products are other than thirty day products?

A. I think the brewery trade get more than thirty days—

Q. (Interposing.) Anyone else?

A. —It is customary—it is the custom in that industry.

Q. It is the custom in that industry?

A. Yes.

Q. Anyone else?

A. And you must consider the sugar—we have to follow the custom of the sugar refiners, the cane sugar refiners.

Q. Any other trade?

A. Not that I know of.

Q. Does Stein Hall Company and Stein Hall Manufacturing Company purchase from Corn Products Refining Company?

A. Very rarely.

Q. What?

A. I would say "rarely."

93 Q. Do you have in mind any purchases that they have made?

A. You mean, recently?

Q. Since June 19, 1936.

A. I heard some discussion recently of their offering us some business. I do not know whether we have it or not.

Q. Mr. Mueller would know?

A. He would know.

Q. Do you know whether you sell through brokers?

A. I beg your pardon.

Q. Do you generally sell through brokers?

A. We have a few brokers but most of our sales are made through our own offices.

Q. Are you speaking of bulk or package goods?

A. I am speaking of both.

Q. When you say "a few brokers"; how many do you mean?

A. Oh, I would say, probably ten.

Q. Can you name those brokers?

A. They are such small ones I cannot name more than one—I could only name one or two.

Q. Do any of them purchase or transmit orders for more than one hundred thousand dollars?

A. Well—

Q. In a year?

A. In a year, yes.

Q. Can you name those?

94 A. Yes.

Q. Do so.

A. Yes, Johnston-Locke and the brokers located at Los Angeles and San Francisco, I will put it that way.

Q. Is any brokerage—any brokerages paid to anyone other than the brokers—

A. You mean, is any brokerage paid to anyone other than to the brokers?

Q. Yes, is any brokerage paid to anyone other than to the brokers that you have referred to?

A. I do not know of any because—no, I do not know of any case where we have paid brokerage to anybody but brokers.

Q. How many distributors of corn products are there other than Corn Products Refining Company?

A. I think there are eight.

Q. Can you name them?

A. Yes.

Mr. Hall: Don't you mean manufacturers?

By Mr. DeBirny:

Q. I mean manufacturers—distributors.

A. Well, Huron, do you include Huron?

Q. They are not manufacturers?

A. They are not grinders, they are manufacturers. They do not grind the corn but they manufacture certain products.

Q. Do they manufacture any corn products?

95 A. Yes, they manufacture mill starches.

Q. They do?

A. Oh, yes, special products.

Q. Do you sell to Huron Milling Company and to Keefer Starch Company?

A. Yes.

Q. That is all that you sell to them?

A. These two companies that is all we sell.

American Maize Products.

Perick and Ford, Limited.

A. E. Staley Manufacturing Company.

Union Starch and Refining Company.

Clinton Company.

Hubinger Company.

I think I have included all of them.

Mr. Hall: Anheuser-Busch Company.

The Witness: Anheuser-Busch Company and Piel Brothers.

By Mr. DeBirny:

Q. In addition to starch do you sell Keever Starch Company or the Huron Company any other products?

A. Not to my knowledge.

Q. Do you know the price at which starch is sold to Keever and to Huron?

A. No, sir.

Q. Why don't you know it?

96 A. It is not a sales matter. I do not get any credit for that. My department does not get any credit for selling them.

Q. How many other companies besides Keever and Huron does your department get any credit for on sales?

A. Well, I do not think there is any other.

Q. Do you know?

A. Wofford Starch Company I don't but that is just one of our subsidiaries.

Q. That is a wholly owned subsidiary?

A. It is a very small unit and amounts to nothing.

Q. What does it sell?

A. It sells some cane mixtures and—well, yes, that is what it sells, cane mixtures and package goods.

Q. Do you sell any products to the Nutrene Candy Company?

A. I do not know whether we are selling them today or not. We have sold them.

Q. Have you sold them since June 19, 1936?

A. My answer would be a guess.

Q. Who would know?

A. Mr. Mueller.

Q. What about the Curtis Candy Company?

A. We sell Curtis.

Q. How much do you sell them, in rough figures?

A. I think we have sold them around two million pounds.

Q. A year?

97 A. This year.

Q. And what did you sell them?

A. We sell them corn starch—I beg your pardon, corn syrup unmixed and also refined sugar.

Q. Corn syrup unmixed and also refined sugar?

A. Yes.

Q. What degree of corn syrup unmixed do you sell them?

A. I think they take Number 42, I am not certain.

Q. Do you know of any instance where companies purchase 42 degree corn syrup unmixed, and obtain a higher grade or higher priced starch or higher priced syrup?

A. I have heard remarks but, I do not know of any instance where any other company has purchased 42 corn syrup unmixed of a higher grade or a higher priced syrup.

Q. I mean by your company?

A. Oh, no, I do not know of any other.

Trial Examiner Diggs: Any rumors to that effect?

The Witness: No.

Trial Examiner Diggs: About your company?

The Witness: No, I had rumors about the other fellow that I heard, but I never heard any rumors about my own company, except from competitors.

Q. Now, with regard to Cerulose—is that the way you pronounce that?

A. Yes, Cerulose. I think it would be very much better if you referred to it as dextrose.

Q. With regard to dextrose, is it sold on the same basis as your other bulk products?

A. No, sir.

Q. Do you know how much starch is sold to the Huron Milling Company?

A. No, sir.

Q. Do you know how much is sold to the Keever Milling Company?

A. No, sir.

Q. Who would know that?

A. It would be easy to ascertain from our records. I do not know what man would know.

Q. Would your bulk sale record show it?

A. Oh, Yes, I think so.

Mr. DeBirny: At this time I offer for identification a contract between the Corn Products Refining Company and Huron Milling Company dated April 21, 1937. Would you care to look at it, Mr. McColester? It consists of nine pages.

Trial Examiner Diggs: The document may be marked as Commission's Exhibit Number 1A to 1I for identification. The Reporter will be careful to mark the first page of the



document which consists of more than one sheet with the letter A so that each page will bear one of the letters of alphabet.

99 (The document referred to, consisting of nine pages, was marked, "Commission's Exhibit No. 1-A to 1-I," for identification.)

Mr. DeBirny: I would like to offer as a Government exhibit to show the parts in which the Keever Starch—

Mr. Hall: Is that not the Huron?

Mr. DeBirny: Yes. Huron Milling Company, in purchasing corn products from the Corn Products Refining Company at the present time—

Trial Examiner Diggs: You mean to offer it in evidence?

Mr. DeBirny: Yes, sir, I offer what has heretofore been marked as Commission's Exhibit 1-A to 1-I, for identification for that purpose.

Mr. McCollester: I object to it, Mr. Examiner. In the first place, I will object on the ground that the contract's authenticity has not been established.

Trial Examiner Diggs: Objection sustained.

By Mr. DeBirny:

Q. Mr. Buhner, do you know who has custody of the contracts of the Huron Company, and the Keever Starch Companies?

A. I imagine—

Mr. Hall: May I say that you do not have to go into any examination to find that out. If you want to subpoena the documents, just give me notice to what it is you want and if it is to go in evidence I will produce it, in the event the Examiner permits it to go in evidence, I will produce the contract. You do not have to prove it this way.

Mr. DeBirny: Well, suppose I just proceed with this examination a little further.

By Mr. DeBirny:

Q. Do you know, Mr. Buhner, whether the price to the Huron Milling Company and to the Keever Starch Company is the same for goods of like grade and quality?

A. I do not know.

Q. Who calculates the prices at which these two companies purchase?

A. Well, I imagine that Mr. Sayre would know, he would be one and perhaps two or three others.

Q. I say, who calculates the price at which they purchase? It is not uniform price; is it?

A. Well— I do not know anything about it.

Q. You do not?

A. No.

Mr. DeBirny: Well, if there is no objection, I would like, at this time to ask that these be marked for identification, these four sheets of the "Industry and Trade Code—also, bulk products sold to each line," showing the division number, the trade number, the products sold to the 101 various industries by the Corn Products Sales Company.

Trial Examiner Diggs: The document may be marked Commission's Exhibit No. 2-A, 2-B, and 2-C and 2-D for identification. It consists of four pages.

(The document referred to was thereupon marked, "Commission's Exhibit No. 2-A, 2-B, 2-C and 2-D" for identification.)

Mr. Hall: Are you going to offer that in evidence?

Mr. DeBirny: I believe I will.

Mr. Hall: I have no objection.

Mr. McCollester: I have no objection.

Mr. DeBirny: If the Examiner please, it seems there is no objection, and I therefore offer it as one exhibit.

Trial Examiner Diggs: I understand that this exhibit is offered in evidence and there is no objection by counsel?

Mr. McCollester: No objection.

Trial Examiner Diggs: Without objection the document may be marked as Commission's Exhibit 2-A, B, C, and D, in evidence.

(Thereupon the document heretofore marked "COMMISSION'S EXHIBIT No. 2-A, 2-B, 2-C and 2-D," for identification, was received in evidence.)

Mr. DeBirny: I would like to ask that a sheet dated May 16, 1938 amending the document just offered and received in evidence be marked for identification.

Trial Examiner Diggs: The document may be so marked. (Thereupon, the document was marked, "Commission's Exhibit No. 3," for identification.)

Mr. Hall: Were these gotten from our offices?

Mr. DeBirny: Yes, sir.

Mr. Hall: No objection.

Mr. McCollester: No objection.

Mr. DeBirny: I will offer them in evidence, in that event.

Trial Examiner Diggs: They may be admitted in evidence—it is just that one sheet there; it may be admitted in evidence. I understand that counsel for the respondent concedes that this paper and the previous one are what counsel states they are in his presentation of them?

Mr. Hall: I understand that they are. I have never seen them before now but I presume that they are correct.

Mr. DeBirny: Now, I offer a notice to the Trade dated August 9, 1938 of the Corn Products Sales Company of St. Paul, Minnesota, be marked for identification.

Trial Examiner Diggs: It may be marked.

(Thereupon the Exhibit above referred to, "COMMISSION'S EXHIBIT No. 3" for identification, was marked in evidence.)

103 (The document referred to was marked "Commission's Exhibit No. 4" for identification.)

Mr. Hall: We will ask, I think, in this case to have the witness identify that. I think it would be well to ask Mr. Buhner to identify that as he will probably know whether this was our notice and whether it went out from our office. I do not know myself.

Mr. DeBirny: I will be glad to ask him.

By Mr. DeBirny:

Q. Mr. Buhner, do you identify this as one of the price lists released by your company?

A. The form is ours and the letter-head is ours. I presume this was. It looks like ours.

Mr. DeBirny: Will you accept it subject to any typographical errors that may be later disclosed?

Mr. Hall: Yes, I am willing for it to go in evidence under that arrangement.

Mr. DeBirny: If you check it over later and find that there are any errors and show them to me of course we will be glad to correct them.

Mr. McCollester: Yes.

Trial Examiner Diggs: I understand there is no objection to that being admitted subject to corrections for typographical errors.

Mr. McCollester: That is correct.

104 Trial Examiner Diggs: The document may be received in evidence.

(The document heretofore marked "COMMISSION'S EXHIBIT 4" for identification, was received in evidence.)

By Mr. DeBirny:

Q. Mr. Buhrer, do you have divisions in your office in the sale of bulk products?

A. Yes.

Q. What are these divisions? Referring to Governments's Exhibits 2-A, 2-B and 2-C and 2-D and what does division 3 mean or indicate?

A. It is a division of certain number of industries which comes under one manager or supervisor.

Q. Who is the supervisor in each one; for instance, who is the supervisor in charge of division No. 1, confectioners?

A. Confectionery—Mr. Ed. Schmidt.

Q. Who is Mr. E. L. Schmidt?

A. E. L. Schmidt—there is only one Schmidt that we have in the New York Office.

Q. Who is in charge of division No. 2?

A. Mr. Cornelia.

Mr. Hall: I do not think that is Cornelia. I believe it is Cornelier.

The Witness: Yes, I believe it is, it is spelled C-o-r-n-e-l-i-e-r.

105 By Mr. DeBirny:

Q. I am referring now to Exhibit No. 2?

A. Yes.

Q. Who is in charge of Division No. 3?

A. Mr. Marden.

Q. What is his first name?

A. Acheson.

Q. Who is in charge of Division No. 4?

A. Mr. Goov—Gus Goov.

Q. Who is in charge of Division No. 5?

A. Number 5?

Q. Yes.

A. Well, it is such a small one, I do not know, that must have been thrown in.

Mr. Hall: That includes seed and oil?

The Witness: Well, Mr. Mueller handles the caramel manufacturers. There are only one or two. I do not know why that should go into the caramel color manufacturers.

I do not know why this division—

106 Mr. Hall: Also this seems to cover some other items in there.

The Witness: Farmers and feeders, well, that would be our feed department and Mr. Rex Waldren, that probably would be put in this division.

By Mr. DeBirny:

Q. I notice starch packers, trade number 35 is also under that.

A. That would not be under starch packers that I know of.

Mr. Hall: It is on page 4.

The Witness: Starch packers—that is wrong.

By Mr. DeBirny:

Q. What is the fact?

A. The chances are that that is out anyway, the starch packers, these departments along this line are changed, they are changing very rapidly. They do not remain the same from day to day, but they are changed quite rapidly as different conditions and other things come up. In fact, they have changed considerably but I do not have the changes and that is the reason I am not entirely familiar with it. I know the principal ones.

Q. Who is in charge of Division No. 6, the last division on the final page I think you will see it.

A. Oh, canned fruits. Number 6, I know something about this number 6, that is jams, jellies, and preserves. 107 I do not understand that one, however.

Mr. Hall: It seems to be mostly cereals, and things of that character.

The Witness: I know about the jams, jellies, and preserves as it is handled in New York, and I know that it is handled by Doctor Buchanan in our Chicago office. But, as far as the fruit juices, the citrus fruit and juices, canned fruit, and vegetable canning, as well as soup canners, that is all in his department. This is a very complicated record. Doctor Buchanan is in charge of the sales.

Mr. Hall: I believe he is the technical man?

The Witness: He is in charge of the sales as well as being the technical man.

By Mr. DeBirny:

Q. Mr. Buhner, referring to Government's Exhibit No. 4, which is a price list released by the St. Paul, Minnesota branch office, when prices are declined, as evidenced by this exhibit—is that a nation wide decline?

A. Yes, sir.

Q. At the present time do you sell at the same price in Milwaukee, Wisconsin as you do in Chicago, Illinois?

A. Yes, sir.

Q. When did you change that practice?



A. I think that was within a year—I do not remember now exactly.

108 Q. You did sell from June 19, 1936 up until some time in 1937 at the same price—

The Witness: I beg your pardon, sir. I should have answered that previous question no instead of yes. I thought you put it in the negative.

Mr. DeBirny: I thought you said in the negative.

Mr. Hall: I was just going to call your attention to it. I believe that question should be asked again.

Mr. DeBirny: I will be glad to do so.

By Mr. DeBirny:

Q. At the present time do you sell at the same price in Milwaukee, Wisconsin as you do in Chicago, Illinois?

A. No, sir. We do not sell at the same price in Milwaukee, Wisconsin as we do in Chicago; no, sir.

Q. When did you change that practice, sir?

A. I think it was within a year, I do not remember now exactly, sir.

Q. You did sell, from June 19, 1936, until sometime in 1937 at the same price in Milwaukee, Wisconsin as you did in Chicago, Illinois; did you not?

Mr. Hall: If you know.

By Mr. DeBirny:

Q. If you know.

A. Well, I do not know those dates. At one time it was in the Chicago zone, I would say, that would be my idea.

109 Q. Who would know?

A. Mr. Mueller, I think, would know.

Q. Mr. Buhrer, does your company issue a price list regularly whenever a change occurs?

A. There is one there. (The witness indicates Commission's Exhibit No. 4.) Yes, we issue them.

Mr. McClester: Issue them to whom?

The Witness: To our customers.

By Mr. DeBirny:

Q. Who is charged with the issuance of those?

A. Every branch manager issues them to his customers.

Q. No. How does the branch manager know about it; how does he get them?

A. He is notified by telegraph, by wire, by the New York office and he reissues to his customers.

Q. Do you keep a record at the office of the prices of the various products in the office in a compact volume or do you keep that record in a compact form of some kind?

A. Yes, sir.

Q. Who has charge of that record?

A. That is, I think, probably Mr. Mueller, he has a book which would show the prices with the changes.

Q. The prices since June 19, 1936?

A. I think so.

Q. Does that include the price on corn oil and feed?

110 A. Well, he would not have corn oil or feed. That would be in another department. He would only have the products that he—

Q. Well, let us—

A. —Products that he sells.

Q. Do you know who would have that?

A. Feed would be handled by the feed department, probably Mr. Holden.

Q. Mr. Holden?

A. Mr. Holden.

Q. And the corn oil?

A. The corn oil by Mr. Himschoot. You are talking about corn oil, do you mean refined or canned, or in the bulk?

Q. I am talking about crude and other than packed.

111 A. The crude would be handled in the feed department and the refined bulk would be handled in the package department.

Q. Where do you maintain branch offices?

A. We have about twenty-three cities.

Q. Can you name them?

A. I can, yes, sir, with a little opportunity to study the thing over.

Q. Start with the New England States, please.

A. Well, there is—if I had a map I could do it better—let's see, there is Boston, Philadelphia, Chicago, Detroit, Cleveland,—do you want the sub-branch offices, too?

Q. Whatever you feel would be classified as a branch office where they do business.

A. Wherever we have a man?

Q. Yes.

A. Well, Cincinnati, Toledo, the Twin-Cities, Wisconsin, Chicago is a branch office, Denver, Portland, Oregon, San Francisco, Houston, Texas, Memphis, Tennessee, Indianapolis, Indiana, Saint Louis, Missouri, Kansas City, Atlanta, Georgia, Greenville, North Carolina.

Q. Greenville, North Carolina; do you not mean Greenville, South Carolina, or Greenboro, North Carolina?

A. Greenville, South Carolina.

Mr. Hall: Baltimore.

The Witness: Baltimore, Albany, New York, Syracuse.

112 By Mr. DeBirny:

Q. Any in Florida?

A. Florida? No.

Q. I believe you have named twenty-two.

Mr. Hall: You named one as "Wisconsin." Do you not have a city in Wisconsin?

The Witness: Oh, yes, that is Milwaukee, Wisconsin.

Mr. Hall: You also referred to the Twin Cities, that is I suppose Saint Paul and Minneapolis. However, since there are other Twin Cities I suppose it would be well to mention them so the record will be straight.

The Witness: Well, it is really neither in Minneapolis nor Saint Paul, but it is half way between Minneapolis and Saint Paul. You cannot have a branch office in either one of these towns or the other, because you would create too many jealousies. Therefore, it is half way between Saint Paul and Minneapolis, Minnesota, in order to keep them both pacified.

By Mr. DeBirny:

Q. Do all of these companies and sub-branches sell bulk products; so far as you know?

A. I think they all do, but of course in varying quantities.

Q. Do you know of any special discounts or additional discounts that are granted on particularly large shipments?

A. What kind of products?

113 Q. Of any bulk products?

A. Over a portion of a year?

Q. Since June 19, 1936?

A. Yes.

Q. Are those volume discounts or individual order discounts?

A. Well—

Q. Do you understand what I mean by "volume discounts" and "individual order discounts?"

A. Yes, that is one, the volume one which is given for bulk over a period of time.

Q. Yes.

A. Well, I would say that they are given because of the customers in question being very large.

Q. What are the names of those customers?

A. The names of those customers are—The Rumford Baking Powder Company—

Q. Does the Calumet Baking Powder Company buy from you?

A. No, they do not buy from us.

Q. When did they stop buying?

A. They stopped buying about, oh, exactly a year ago.

Q. Did they receive any discount?

A. Yes.

Q. When did they buy from you?

A. Well, it was before that time.

Q. And they did receive a discount when they were 114 buying from you?

A. Yes, the same as the Rumford Company. There is another one, I cannot think of the name.

Q. You cannot think of the name?

Mr. Hall: What line of business?

The Witness: Baking Powder.

By Mr. DeBirny:

Q. Outside of baking powder field what other ones do you recall?

A. Are you including feed in this?

Q. Yes.

A. I recall a contract with the two large feed companies.

Q. Who are the two large feed companies?

A. The Allied Mills, and the G. L. T.

Q. Did you say you recall having contracts with them?

A. Oh, yes.

Q. Who has custody of those contracts?

A. Those contracts were made by—I think Mr. Walden might have those contracts.

Q. Does Schilling and Company engage in the manufacture of baking powder? And do they obtain any discounts?

A. Who?

Q. The Schilling and Company.

A. I do not know them. I never heard of Schilling and Company.

115 Mr. Hall: Who was that?

The Witness: Schilling and Company. I do not know them.

By Mr. DeBirny:

Q. Does the Jewel Tea Company obtain any discounts in the manufacture—in that trade; the baking powder trade?

Q. I do not think so.

Q. What quantity must you buy to obtain a discount?

A. Well, there is nothing—there has never been any particular arrangement about that except for the specified companies and there are two companies that receive it, because these are the two larger companies and it was done in order to meet competition with these two companies.

Q. You say it was done to meet competition?

A. Yes.

Q. When did that occur?

A. It has occurred for a long time. I do not sell the baking powder companies but I think that everyone of these got something.

Q. Was there any discussion about the granting of this discount to these large baking powder companies regarding the entire subject or any part of it reported in the minutes of the merchandising committee?

A. I think not.

116 Q. What committee did discuss the matter?

A. I do not know as it was discussed in any committee, it was just probably carried over from one year to another.

Q. What was that?

A. I do not know that it was discussed in any committee, but it was probably as I recall it just carried over from one year to another.

Q. In discussions that you have had have any discussions on this occurred since the passage of the Robinson-Patman Act?

A. Oh, yes.

Q. Would that have occurred in any of the meetings of the committee and would that be reported in any of the minutes of the Merchandising Committee?

A. No, that would not be a discussion in any committee.

Q. What was that?

A. No, that would not be recorded in the minutes of any meeting; it would not be the subject of discussion in a committee meeting.

Q. Who was discussed with?

A. Well, I imagine it was discussed with our counsel.

Q. You imagine so; do you know?

A. I should know; yes, sir; it was.

Q. Who else?

A. Just with the sales department.



117 Q. By the sales department do you mean Mr. Mueller and yourself?

A. Yes.

Q. What about the Viscose Company; does it obtain any preferential price?

A. No, sir.

Q. Are they one of your largest customers?

A. They are. They are in a specialized field.

Q. They buy more than either Calumet or Rumford?

A. They buy a different product entirely. There is no competition. There are only a few companies like the Viscose Company, if any.

Q. There is competition in the sale of the goods to them; is there not?

A. Yes.

Q. Is Corn Products Refining Company or any of its subsidiaries engaged in the sale of candy?

A. No, sir.

Q. No?

A. No.

Q. Does the Corn Products Refining Company or Corn Products Sales Company engage in the sale of candy?

A. No, sir.

Q. What discounts are granted to Rumford and to Calumet?

A. I think it is ten cents a hundred. I am not certain of that.

Q. Ten cents a hundred over and above the carload price?

A. Yes.

Q. Where are deliveries made to?

A. I think they are made to their New England plant. They are at Hartford, I think. I think they are located at Hartford; I am not sure.

Q. Who would know?

A. Mr. Mueller.

Trial Examiner Diggs: From where are those deliveries made?

The Witness: They are probably made from Argo, Illinois.

By Mr. DeBirny:

Q. Aside from Corn Products Sales Company are goods sold—manufactured by Corn Products Refining Company sold to any other company?

A. I think not. I do not know of any.

Mr. Hall: How about Wofford?

The Witness: Wofford does not sell what he buys. He manufactures the same as any other customer.

By Mr. DeBirny:

Q. I am talking about any subsidiary or controlled company?

A. To whom do they sell—who sell our products is that what you mean?

119 Q. Yes, other than Corn Products Sales Company?

A. You mean in the form in which it is bought by them.

Q. Under the contract—I do not care what form it is or what it is—

Mr. McCollester: I do not understand what your question is there. Are you referring to a contract?

Mr. DeBirny: Oh, no, I was thinking of control.

By Mr. DeBirny:

Q. I refer now, to company other than the Corn Products Sales Company but under the direct control—I do not care what form it is in or what it is your store is under the direction and control of the Corn Products Refining Company?

A. Well, our subsidiary Wofford would sell.

Q. Aside from Wofford?

A. Well, the New England Grain Company would sell gluten and feed.

Q. Does Corn Products Sales Company also sell glue and feed?

A. Gluten—g-l-u-t-e-n, not glue.

Mr. Hall: He said gluten, not glue.

By Mr. DeBirny:

Q. Do you—did you say “glue”, or “gluten”?

A. No, gluten.

Q. Gluten?

A. Gluten.

120 Q. Now, you report all of your sales at the end of each day to the Corn Refiners Statistical Bureau; don't you?

A. Yes, sir.

Q. You get from them reports, also?

A. Yes, sir.

Q. You get inquiries as a result of those reports regarding prices that are not in accord with your regular and customary prices?

A. Will you repeat that question?

Q. Do you get, as a result of furnishing that information to the Corn Refiners Statistical Bureau questions with regard to certain sales that on their face appear to differentiate from your regular prices?

A. Well, we get inquiries through the Statistical Bureau.

Q. That is what I mean?

A. From competitors with reference to past transactions. I thought you meant in our own company. I do not know what prompts those inquiries.

Q. Are those inquiries filed together?

A. The Statistical Bureau has a full record of everything.

Q. No, I am asking if in the Corn Products Refining Company when you get an inquiry—

A. Yes.

Q. —to a price that does not appear to be in accord with the usual and customary price, whether that inquiry—

A. I don't know what you mean by that.

121 Q. —whether that inquiry is filed and any other subsequent inquiry is kept in the same files?

A. I do not know whether we put the records of that sort with the inquiries and answers together or not.

Q. Who would know?

A. Mr. Mueller possibly would know.

Q. Do you know whether or not any other refiner of corn products has more than one plant for the grinding of this product?

A. I do not believe any of them has. You mean in the grinding plant?

Q. Yes.

A. Or any kind of a plant, because Penick & Ford, of course, have a mixing plant.

Q. Is that where they mix the various materials together?

A. Yes.

Q. Where is that mixing plant located?

A. In New Orleans, Louisiana?

Q. At New Orleans, Louisiana?

A. In New Orleans, Louisiana, and also Anheuser-Busch Company have a mixing plant also in New Orleans, Louisiana.

Q. When you are talking of a mixing plant you are talking of mixing feed with syrup?

A. Syrup, cane, molasses.

Q. All right.

122 Q. Has any advertising allowance been granted to any buyer of bulk corn products since June 19, 1936?

A. I think I can say "no" to that question.

Q. Who would know?

A. Well, I would know.

Q. Has the Curtis Company received any such allowance?

A. I would not say so.

Q. In the expenditure—any expenditure been made on behalf of the products that you sell to the Curtis Company?

A. Well, but I would not call it an advertising allowance.

Q. What would you call it?

A. I would call it an investment in dextrose advertising.

Q. What are the details with regard to that?

A. The sales department under my direction handles the entire matter; is that what you wanted to know?

Q. Yes. They would handle the details of it?

A. Yes, the sales department, of course, under my direction, as I said.

Q. Is that matter kept in a special record?

A. No. There is no money given to the Curtis Company.

Q. I know—

A. So does—so it is—it would be a record of advertising.

Q. What do you advertise?

A. We advertise dextrose.

Q. Do you advertise anything besides dextrose, for  
123 the Curtis Company?

A. I beg your pardon?

Q. Do you advertise anything besides Dextrose for the Curtis Company?

A. No, sir.

Q. You sell dextrose to other companies; do you not?

A. Yes, sir.

Q. Do you give them similar advertising?

A. We would if they could give us the service. We would be glad to do it with anybody because it would help us.

Q. What do you mean by that?

A. If they should sell us what the Curtis Company has to sell, we would be glad to make a similar outlay. We have offered similar deals to others.

Q. What is the nature of the deal that you give to the Curtis Company?

Mr. McCollester: Now, Mr. Examiner, I interpose an objection here to this testimony on the ground that this is something now going into the matter outside of the complaint.

There is no reference in the complaint whatsoever that makes an allegation of price discrimination as a result of advertising allowance.

By Mr. DeBirny:

Q. You say you would not call it an advertising allowance?

124 A. I would not call it an advertising allowance; not as we understand advertising allowance in the trade.

Trial Examiner Diggs: Let me pass on this objection before you go on to any further questioning. I think under paragraph 5 of the complaint that this testimony is admissible.

Mr. McCollester: May I make the point Mr. Examiner, that paragraph 5 is an allegation simply in terms of the statute.

Trial Examiner Diggs: The complaint, of course, speaks for itself.

125 Trial Examiner Diggs: Mr. McCollester, will you state your objection?

Mr. McCollester: My objection is to this effect, Mr. Examiner, that the respondent is entitled to be informed by the complaint as to the way or ways in which it is claimed by the counsel for the Federal Trade Commission that the provision of the statute as set forth in paragraph 5 has been violated; that inasmuch as the complaint is the only indication as to the method by which it is claimed that the statute has been violated, I want to point out that that is set forth in paragraph 6 which refers to the delivered price. There is no suggestion in the complaint that discrimination is claimed to result from advertising rebates or allowances or whatever the term may be or in any other respect than delivered price.

Trial Examiner Diggs: I overrule the objection upon the ground that I think paragraph 5 is sufficiently specific in that it states that these respondents, as a matter of fact, did sell some purchasers at a higher price than they sold others and, therefore, I do not think it is necessary to say the particular manner in which they did it but if they set out that fact it is sufficient.

You may have exceptions to that ruling.

Mr. McCollester: I note an exception.



By Mr. DeBirny:

126 Q. What is the nature of the deal that you gave to the Curtis Company?

127 Mr. McCollester: Mr. Examiner, I want to make the further objection to the question which Mr. DeBirny has asked that the question and the answer or that the answer to the question, certainly, would go to a possible violation of paragraphs B and E of Section 2 of the Act but not to the question of violations of Sections 2(A) which is the only section alleged in the complaint that is alleged to have been violated.

128 Mr. DeBirny: Mr. Examiner—

Mr. Hall: The statute contemplated in the several kinds of—

Mr. DeBirny (interposing): I would like to suggest this, and on the record, that I will give notice that I will amend the complaint to include the charge of Section 2-E and should it develop that this is, in fact, a discrimination coming within the purview of Section 2-E, it will be covered in it.

Trial Examiner Diggs: That statement is on the record. I overrule the second objection for the reason that under Section 2(A) we are dealing with price discrimination; Paragraph 5 of the complaint deals with the same subject. Therefore, the allegations of Paragraph 5 are concerned with Section 2(A) of the Act. I think I already ruled that it is unnecessary to state the specific details connected with the differential in price no matter how accomplished. That constitutes the alleged discrimination but it is necessary only to state that there has been such a situation. You may have an exception to that.

By Mr. DeBirny:

Q. What is the nature of the deal that you made to the Curtis Company?

A. We did not give the Curtis Candy Company any money or any allowance or any rebates but we did invest a certain amount of money to buy space in their advertising for our dextrose.

In other words, we bought that advertising the same as we would buy newspaper advertising or bill-board advertising. We used that space to advertise our dextrose.

Q. Who inserted those advertisements in the newspapers?

A. Well, it was not only newspapers, it was all kinds of advertising. It was done by their agency.

Q. Regardless of whether it was in newspapers or in magazines.

A. Newspapers and magazines would come under the agency but of course there is lots of other advertising, of course, like bill-boards and signs, road signs, radio and all of that.

Q. When was that done?

A. When was this done?

Q. Yes.

A. It was done during the year.

Q. You mean this year?

A. This year.

Q. What about last year?

A. Oh, yes.

Q. What about June 19, 1936?

A. I do not know just when it was started but we have been doing this advertising for about two and a half years I guess.

130 Q. How much money have you expended?

A. In that advertising?

Q. Yes.

Mr. McCollester: May it be understood that my objection goes to this whole line of testimony separately and severally.

Trial Examiner Diggs: Yes, it is understood that your objection goes to this entire line of testimony and to the individual questions and answers and an exception is noted, also, in the same manner.

By Mr. DeBirny:

Q. How much money have you expended?

A. Somewhere between a half and three quarters of a million dollars.

Q. Have you expended any sums of money in a similar manner for one of your other customers to purchase dextrose and who are competitively engaged with the Curtis Company?

A. Yes, we have one customer in New England.

Q. Who is that?

A. Lewis Candy Company.

Q. How much money have you expended for them?

A. I do not remember, that was a much smaller campaign covering a much smaller distribution than the Curtis Candy Company. It was say from about thirty thousand dollars or something like that.

131 Q. Any other customers?

A. Yes, we have a consumer, a small chocolate manufacturer in Pennsylvania.

Q. Who is that?

A. Bachman.

Q. Who?

A. Bachman—B-a-c-h-m-a-n. That was a very small man and a very small amount.

Q. Approximately how much?

A. Oh, I should say about eight thousand dollars.

Q. Now, with regard to these payments or expenditures of thirty thousand dollars and eighteen thousand dollars, how was that money expended?

A. In the same way.

Q. With the advertising agency?

A. Yes. The customer did not touch a dollar and the customer did not get a dollar. This advertising agency placed our money so that we were spending it and we were spending it on dextrose.

Q. In conjunction with the names of the other companies?

A. Of course we got a great deal of service from them in the advertising of our product, through the medium of using their labels which ran into the millions and the millions of packages by the Curtis Company.

Q. Were those expenditures made pursuant to contracts?

132 A. No contracts.

Q. Agreements or understandings?

A. We just appropriated a certain amount of money and told the agency to go ahead.

Q. There was no understanding as to what the other company would do?

A. What our customer would do?

Q. Yes.

A. He spent two dollars for every dollar we spent.

Q. Was that the proportion on which the three dollars were spent?

A. By Curtis, yes.

Q. They would spend two dollars and you would spend one dollar?

A. Well, yes.

Q. What about the other two companies?

A. Well, they were so small that they were more test companies than anything else.

Q. Before or after the Curtis?

A. We wanted that to tell us what it do and that is why we chose Bachman on the chocolate bar, it was purely experimental, before.

Q. You did not offer this two dollars for every one dollar or one dollar for every two dollars to all of your customers?

A. Yes, we will be glad to do that.

133 Q. Did you?

A. Yes, we approached the firm of Mars before we went to Curtis.

Q. Did you offer them that?

A. Yes, we did.

Q. All of them?

A. The smaller ones are incapable of giving us the service. They do not have national distribution, they do not do advertising. We do not have anybody like that but Curtis—Curtis is alone in that respect of national distribution.

Q. I thought you said Mars did also.

A. Mars was, but not any more. We are only too glad to cooperate with all of them in our sales of our dextrose, to give us the advertising, we called on Mars and asked him to do that.

Q. Does the American Maize Company manufacture dextrose under a license from your company?

A. Yes, sir.

Q. Does any other company manufacture dextrose under a similar license?

A. No, sir.

Q. Is that arrangement in a contract or not?

A. With Maize?

Q. Yes.

A. Yes, it is.

134 Q. Do you know where that contract is, and when that contract was entered into?

135 A. Well we have had two or three contracts with them, the details of which I am not familiar with.

Q. Who would know?

A. Our counsel.

Q. How many pounds of your various products, are in a bag?

A. They range from one hundred to one hundred and forty pounds.

Q. What is contained in a one hundred pound bag?

A. Sugar and starch.

Q. What is in a hundred and forty pound bag?

A. Starch—

Q. (Interposing.) Oh, the same products?

A. Yes, there is just a difference in the custom. Sometimes we ship one hundred pounds and sometimes one hundred forty pounds.

Q. When you quote a price in barrels, in drums, or bags, that is on a one hundred pound basis; is it not?

A. Yes, sir.

Q. How many pounds are in a barrel of glucose?

A. About four hundred pounds, I don't know exactly.

Q. Who would know?

A. Mr. Mueller can give you all that information.

Q. In connection with the sale of bulk products, do you perform any services for any of your customers?

A. Sales services, do you mean?

136 Q. Any kind of services.

A. Not that I know of. The only service we perform is the one they pay for.

Q. I am talking about, in one instance you granted them advertising—what I am asking, do you install any equipment or anything of that nature, or maintain men in any of the plants of any of your customers?

Mr. McCollester: My objection goes to that question. I don't know what the answer will be, but I object on the same grounds as before.

Trial Examiner Diggs: That is on the ground that this may be a means of affecting the price, if something of value were given which is equivalent to money. Overruled, you may have an exception.

The Witness: You are probably referring to installations for the handling of C. S. U. We don't do that any more.

By Mr. DeBirny:

Q. When did you stop?

A. That is a matter of record, I can't tell you. Mr. Mueller can probably tell you about that.

Q. Have you done any of that since July—since June 19, 1936?

A. I imagine probably once or twice since that time.

Q. Do you have in mind the companies?

137 A. No, sir.

Q. Do you sell in tank car lots to Quaker Maid over in Brooklyn, when you sell them C. S. U.?



A. I think they buy in tank cars. I know, we offer to them in tank cars.

Q. Have you offered to sell to every one in this vicinity in tank cars?

A. We can only sell in tank car lots to those who have sidings.

Q. Can any of them obtain in tank car lots?

A. Those who have sidings can.

Q. Do you know whether there is an absorption in the transfer charges at Chicago in the sale of goods?

A. I don't know.

Q. At the present time do you sell to the Arabol Manufacturing Company?

A. Yes.

Q. Do you sell to Atlas Powder?

A. We have. I don't know whether we are right now or not.

Q. Do you know whether you sell to Beech Nut?

A. I know that we have.

Q. Since June 19, 1936?

A. I presume we have since then.

Q. Do you sell to the Berghausen Chemical Company?

A. Yes.

138 Q. To Bliss Fabian & Company?

A. That sounds like a broker.

Q. No, they are manufacturers.

A. I am not familiar with them.

Q. Broch and Sons?

A. We have sold them.

Q. When you say that you have sold them, I assume you mean since June 19, 1936?

A. Yes.

Q. Calumet Baking Company?

A. Yes.

Q. Central Leather Company?

A. Yes.

Q. D. L. Clark of Pittsburgh?

A. Yes, sir.

Q. R. B. Davis, of Hoboken?

A. Yes.

Q. Du Pont, of Wilmington?

A. Yes.

Q. Fleishmann?

A. No. At least I don't think so, I am not certain.

Q. Henry Heide?

A. Yes.

Q. Mars?

A. No, we don't get the Mars business.

139 Q. When did you stop selling to them?

A. I don't think we have sold them in the last two years.

Q. Do you know whether you have sold them since June 19, 1936?

A. I don't think we have, I might be mistaken.

Q. National Biscuit Company?

A. Yes.

Q. National Adhesive Corporation?

A. Yes.

Q. National Gum and Mica—that is the same thing; isn't it?

A. Yes.

Q. New England Confectionery?

A. We have sold them.

Q. When did you stop selling them?

A. I think maybe a year and a half or two years ago.

But we do sell them a little starch now.

Q. Rumford Chemical?

A. Yes.

Q. Steinhall?

A. Yes. You are asking if we have sold these customers?

Q. Yes, since June of 1936.

A. Yes.

Q. What about Trojan Powder?

A. Can't say.

140 Q. What did you say about that?

A. I am not familiar with that account.

Q. J. S. Leather?

A. Yes.

Q. Viscose?

A. Yes.

Q. William Wrigley?

A. Yes.

Q. York Chemical?

A. I am not familiar with that account.

York Caramel is an account.

Mr. Hall: Yes, York Caramel.

By Mr. DeBirny:

Q. York Caramel. I guess this was copied wrong.

A. Yes, sir.

Q. In connection with the sale of your goods, the bulk products, that is to your various customers; do you purchase anything from any of your customers?

A. Well, in one or two instances we have.

Q. What instances?

A. We have purchased chocolate from the United Drug at Boston, and we have purchased chocolate—

Q. (Interposing.) Who would know definitely all of the purchases you have made, of that nature?

A. Mr. Mueller or Mr. Campbell.

141 Q. At the present time do you guarantee against price declines?

A. To date of shipment.

Q. You make no other price guarantees?

A. You are talking about bulk?

Q. Yes.

A. No, I think that is all, just to date of shipment.

Q. With reference to cash discounts, do you have any special terms?

A. Two per cent. ten days.

Q. Do you have any variations from that?

A. Oh, yes. I mean, we have none in our policy, but we have trouble with it, if that is what you mean.

Q. Is that same trouble—is that trouble the same type of trouble as you have with the five-day option?

A. Yes, the same thing exactly.

Q. The same customers?

A. No, I would not say that.

Q. Do you have in mind any particular customers?

A. On the two per cent. ten days?

Q. Yes.

A. No.

Q. Would Mr. Mueller likely know?

A. The credit department would likely know better about that.

Q. Do you directly extend any loans to any of your  
142 buyers of bulk goods?

A. Have we, you ask?

Q. Yes, since June 19, 1936?

A. Yes, we have.

Q. To whom?

A. I think it was the Louis Company.

Q. Any others?

A. I cannot recall.

Q. Do you know of any instances where your company has delivered any Corn Products of a higher quality than that specified in the contract, unless an appropriate charge was made therefor?

A. No, I am sure we didn't do that purposely, or with my consent.

Trial Examiner: We will take a short recess.

(A short recess was taken.)

Trial Examiner Diggs: On the record.

Mr. DeBirny: I think I have asked the witness about everything I want to bring up at this time.

That is all.

Mr. McCollester: As I understand it, it is agreeable to counsel for the Federal Trade Commission to defer cross examination, and with that understanding I will not cross examine this witness at this time.

Mr. DeBirny: Mr. Examiner, I have exhausted all inquiry I want to make at the present time of Mr. Buhrer.

As I understand, counsel for the respondent will defer their cross examination.

I may, prior to your cross examination, desire to conduct some further direct examination, at a convenient time.

Trial Examiner Diggs: It is agreeable to you for counsel for the respondents to defer the cross examination?

Mr. DeBirny: It is to me.

Trial Examiner Diggs: All right, that may be done.

You have no further testimony this afternoon?

Mr. DeBirny: I have no further testimony today.

Trial Examiner Diggs: We will adjourn until tomorrow morning at 10:00 o'clock, at the same place.

(Whereupon, at 2:20 p. m., December 5, 1938, the hearing in the above-entitled matter was adjourned.)

148 Tuesday, December 6, 1938, at 10:00 o'clock a. m.

Trial Examiner Diggs: You may proceed. The hearing is called to order.

Mr. DeBirny: Will you swear the witness, please?

FRED MUELLER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

*Direct Examination by Mr. DeBirny.*

Q. State your name, please.

A. Fred Mueller, M-u-e-l-l-e-r.

Q. What position do you hold with the Corn Products Refining Company?

A. I am vice-president of the Corn Products Sales, and manager of bulk sales.

Q. For how many years have you been connected with the Corn Products Sales Company?

A. With which company?

Q. With the Refining Company or the Sales Company.

A. Since 1902.

Q. What positions have you held?

A. I started as bill clerk and shipping clerk, and then worked in the sales department until I advanced to the present position.

Q. Always in New York?

149 A. Always in New York.

Q. Who is president of the Sales Company?

A. Mr. Buhrer.

Q. As vice-president of the Sales Company, what are your duties, Mr. Mueller?

A. Well, to promote the sales of bulk products, and acting in an advisory capacity to all our different sales representatives.

Q. How many years have you held the position you hold at present?

A. About four years.

Q. And before that what did you do?

A. Before that I was handling the Eastern Division of Bulk Sales.

Q. Yesterday Mr. Buhrer testified with regard to sales of cerelese to the Curtis Candy Company; that is the same as dextrose, is it?

A. That is dextrose.

Q. That is dextrose?

A. Yes.

Q. Where is dextrose manufactured?

A. At Argo, Illinois; Kansas City, Missouri, and Pekin, Illinois.



Q. Is any manufactured at Edgewater?

A. No.

150 Q. How many years has the company been manufacturing dextrose?

A. It goes back a good many years—there has been an improvement in the product—wait a moment. I would say, I really cannot give you a definite answer on that, as to how long it has been manufacturing dextrose.

Q. Approximately, that is all.

A. Approximately, I would say fifteen years.

Q. What is dextrose, in language that a lay man can understand?

A. Well, it is a sugar.

Q. Is it similar to glucose?

A. No. Dextrose is in dry form, and glucose is in liquid form.

Q. How many years have you been selling dextrose to Curtis Candy Company?

A. I don't know exactly.

Q. Did you start selling them at the time you entered into the advertising arrangement with them?

A. I am not familiar with the advertising end.

Q. Were you selling dextrose to Curtis Candy Company prior to June 19, 1936?

A. Yes.

Q. Have the purchases of dextrose by Curtis Candy Company increased greatly since the advertising arrangement?

151 A. Yes.

Q. Were they purchasing glucose, or other corn products, to use in their candy making from other manufacturers prior to the time of this arrangement on the advertising?

A. Yes.

Q. They were?

A. Yes.

Q. Do you have the records of their purchases since June 19, 1936?

A. Not with me.

Q. They are in the possession of your department, are they not?

A. Yes, that is right.

Q. Are they known as the bulk sales records?

A. Correct.

Q. The bulk sales records will not show the quantities purchased, will they?

A. Please repeat that.

Q. Well, the bulk sales records—will the bulk sales records show the quantities purchased by any customer?

A. Yes.

Q. And the price paid for the goods?

A. That is right.

Q. Do you know whether or not the Corn Products Sales Company or Corn Products Refining Company grant 152 any quantity discounts to any customers?

Mr. McCollester: Have you in mind any particular customers?

Mr. DeBirny: I am asking him if he knows any.

Mr. McCollester: Mr. Examiner, I think it is proper to interpose an objection to a question of this kind.

If counsel for the Trade Commission has reason to believe that any particular contracts involve quantity discounts, let him ask about those contracts, but I object to a general fishing question.

Trial Examiner Diggs: The objection is overruled.

Mr. McCollester: Exception.

Mr. DeBirny: Read the question.

(The question referred to was read by the reporter.)

The Witness: We have made allowance, quantity allowance to the Rumford Baking Powder Company and to R. B. Davis Baking Powder Company on starch.

By Mr. DeBirny:

Q. Do you make an allowance to Calumet Baking Powder Company?

A. We don't sell Calumet.

Q. Have you sold Calumet since June 19, 1936?

A. Yes.

Q. Did you make them such an allowance?

A. Yes, we did.

153 Q. Was the allowance the same to all three of those companies?

A. The allowance was the same.

Q. Do you have other customers who are classified in the same trade as these three?

A. We do sell some other baking powder concerns, but the quantity which they buy is very, very small in comparison with these two concerns.

Q. Do you grant them any discounts?

A. No.

Q. Do you have in mind any other discounts granted by  
—Corn Products Sales Company?

A. There is no other that I know of.

Q. What grade or quality of starch do you sell to those companies?

A. It is re-dried powdered starch.

Q. Does it have any special name?

A. Yes, it is sold under the brand of Buffalo XX or Buffalo XXX.

Q. Are the two brands the same, whether they have two X's or three X's?

A. The two X is seven and one half per cent. moisture and the three X is five per cent.

Q. Mr. Mueller, yesterday Mr. Buhrer testified with regard to certain allowances made to Curtis Candy Company and to two other smaller companies, do you have in 154 mind any other advertising allowances than those Mr. Buhrer testified about?

Mr. Hall: Mr. Examiner, I object to the form of the question. Mr. Buhrer didn't testify to any allowances, specifically. I am only objecting to the word, "allowances," to that quotation of the language of the witness.

Mr. DeBirny: I accept the correction.

By Mr. DeBirny:

Q. With regard to certain payments made for certain customers.

A. I really am not familiar with the advertising.

Q. Who is?

A. Mr. Buhrer.

Q. Do you have someone in your organization, under you or under Mr. Buhrer, who definitely knows with regard to all advertising allowances?

A. I am not on the advertising committee, so I really don't know.

Q. Would the advertising committee have charge of that matter?

A. Yes.

Q. Who is Chairman of that committee?

A. Mr. Buhrer.

Q. Who is secretary of that committee?

A. I don't know. I don't sit on that committee.

Q. Well, as sales manager, don't you have occasion to discuss those matters with your customers?

155 A. Just what matters do you mean?

Q. I am talking about these allowances, like to Curtis Candy Company.

A. I don't know what the arrangement is with Curtis, and I have never talked advertising allowances to any of our customers.

Q. Do you know who conducted the arrangements with those customers?

A. No, I don't know.

Q. Do you have in mind any special contracts for the sale of corn products at other than the regular and customary published prices at which you sell?

Mr. McCollester: I object to that, Mr. Examiner.

If counsel for the Trade Commission has reason to believe there are any such contracts let him ask about particular contracts. I object to a general fishing question.

Trial Examiner Diggs: Read the question.

(The question referred to was read by the reporter.)

Trial Examiner Diggs: I overrule the objection.

It may very well be that the attorney for the Commission may not know of any specific case, and that is what he is trying to find out, and besides it might be well for me to state now that this proceeding is not to be likened to a trial in Court, because here we have no plaintiff and 156 defendant.

This is purely a fact finding body, and having found the facts then they make an Order to fit them, so that a good deal of latitude must be allowed.

I mention that in answer to your suggestion of a fishing expedition. In the nature of things, these inquiries have to be more or less in that nature and not like a proceeding in Court.

Mr. McCollester: I make the point—

Trial Examiner Diggs: Off the record.

157 Trial Examiner Diggs: On the record.

Counsel for the respondent may have an exception to the ruling.

Mr. DeBirny: Read the question.

(The last question was read by the reporter.)

Mr. Hall: The witness has already answered that there were not any except the Rumford and the other contracts mentioned.

Mr. DeBirny: Will you answer the question?

The Witness: There are not any other contracts that I know of which carry any allowances.

By Mr. DeBirny:

Q. Which carry any allowances?

A. Any allowance or special price.

Q. What about the Keever contract?

A. I am not familiar with the Keever contract. That is a manufacturing proposition.

The sales department does not get any credit for that, in fact they are competitors of ours.

Q. What do you mean?

A. They sell to the same trade we do.

Q. Do they sell the same products?

A. They sell the same kind of products.

Q. What do you mean by the same kind of products?

A. Starch.

158 Q. Do they sell anything else that you sell?

A. Not to my knowledge.

Q. What trade do they sell that to?

A. Textile, principally.

Q. Do they sell the same grade and quality of starch that you sell?

A. I am really not familiar with all of their lines. They do make starch similar to ours.

Q. Do you know whether the starch which they sell is manufactured by your company?

A. I know some of it is, but they have a plant at Columbus, but whether they do any further processing, I am not familiar with.

Q. You do know that they do not grind any corn at Columbus?

A. No, I don't know that.

Q. Have you ever been out to their plant there?

A. No, sir, I have not.

Q. Yesterday, Mr. Buhrer testified to a special feed contract; do you have any idea what he was talking about?

A. No.

Q. Do you know whether there were any special contracts for the sale of feed?

A. I don't know. That is handled by the feed department.

My department just handles corn syrup and starches.

Q. Who is in charge of the feed department?

159 A. Mr. Kayhart.

Q. Does he come under you?

A. No.



Mr. McColleston: Mr. Buber told you all about that yesterday.

By Mr. DeBirny:

Q. Are you a member of the Merchandising Committee?

A. Yes.

Q. Do you recollect whether any discussion has occurred in the Merchandising Committee meetings with reference to the Keever or Huron contracts?

A. Not in my presence.

Q. Are you a member of any other committees?

A. The Development Committee, that is development of new products.

Q. Is dextrose one of your new products?

A. I mentioned before that it has been about fifteen years on the market.

Q. You do not consider it a new product, then?

A. No.

Q. There was no discussion—or was there any discussion in the Development Committee with reference to the Curtis Candy Company arrangement?

A. No.

Q. Mr. Mueller, what is the business of the Hummell 160 Downing Company?

A. They make cartons.

Q. Mr. Mueller, do you hold office with the National Adhesive Corporation?

A. Yes.

Q. What are your duties in that corporation?

A. I am a director.

Q. What sales are made to customers by the Corn Products Refining Company and what by the Corn Products Sales Company?

A. It is practically all sales company. I am not—it is not clear to my mind now whether we have refining company sales in any of the States. It is practically all Sales Company, though.

Q. Do you have anything to do with the sales made by the Corn Products Refining Company?

A. Yes.

Q. And you say you have no recollection as to what sales they make?

A. I don't know in what States, if any, there are sales still made by the Refining Company. It is all done by the same organization or by the same representatives.

Q. Is there any reason that you know of for putting some of the sales through the Corn Products Refining Company?

A. No, I imagine it is tax purposes, but I don't know the reason.

161 Q. Then sales are made through the Corn Products Refining Company or through the Corn Products Sales Company, are the same prices charged for the same goods?

A. Exactly.

Q. Do you know where the goods sold to customers located at Baltimore and Philadelphia are manufactured?

A. Principally at—what products do you have in mind?

Q. Starches, glucose, products sold to confectioners generally.

A. Well, corn syrup would be shipped principally from the Argo plant. Now and then we make shipments from our plant at Edgewater.

Q. How much glucose has been produced at Edgewater?

A. I don't know. That is a difficult question for me to answer.

Q. Have you sold the glucose produced at Edgewater?

A. Yes.

Q. To what class of trade did you sell that glucose?

A. To the confectionery trade, jelly manufacturers.

Q. Did the bulk of it go to the confectionery trade and the jelly manufacturers?

A. I would say so, yes.

Q. Are you speaking of that glucose which was manufactured in 1937 at Edgewater?

A. That is right.

162 Q. Was that glucose of the same quality as the glucose manufactured at Argo and Kansas City or Pekin?

A. Yes.

I would like to correct your opinion on Pekin. Pekin didn't make any corn syrup.

Mr. McCollester: Right at this point as to quality—

Mr. DeBirny: What?

163 By Mr. DeBirny:

Q. Mr. Mueller, when I asked you with reference to the glucose produced in 1937 at Edgewater, I had in mind glucose produced from tapioca.

Do you want to change your answer?

A. Yes, I do, because I don't think tapioca went into any of their glucose.

Mr. Hall: You can get all of that from Mr. Sayre.

By Mr. DeBirny:

Q. What did it go into?

A. Sugar.

Q. To whom did you sell that sugar?

A. It went to the brewing trade.

Q. All of it?

A. Practically all.

Q. Was that product sold at a lower price than your usual and customary price?

A. Pardon?

Q. Was that product sold at a lower price than your usual and customary price?

A. No.

164 By Mr. DeBirny:

Q. What customers in New England purchase in tank car lots?

A. Joseph Middleby, Jr., Incorporated.

Q. Where are they located?

A. In Boston.

Q. Are they engaged in the confectionery business?

A. No, they are in the jelly business. The New England Confectionery Company of Boston and Edgar P. Lewis Company, they are at Malden, Massachusetts.

Q. Do you know where the glucose which they purchase in tank car lots from your company is manufactured?

A. Yes, principally—principally at Argo, Illinois.

Q. Do you manufacture, or did you manufacture any that you sold in tank car lots to these customers at Edgewater?

A. Yes, emergency shipments have been made from Edgewater.

Q. Is there any reason why you only make emergency shipments from Edgewater?

A. Well, it is rather expensive to make shipments from Edgewater on account of freight.

Q. It costs more, did you say, to ship from Edgewater than it does from Argo?

A. No, I didn't say that. I say, it is rather expensive to ship from Edgewater due to the freight involved.

In other words, your costs at Edgewater are high due to freight in getting raw material there, and freight 165 from there to New England.

Q. On the shipments from Edgewater is there any milling in transit allowed?

A. No.

Q. What?

166 A. No.

Q. Mr. Mueller, into how many zones do you have the country divided for the purpose of your package goods?

A. I do not know anything about package goods.

Q. When you sell glucose to customers in tank cars what arrangement is made with regard to the leasing of those cars to the customers?

A. There are no more leases.

Q. What?

A. No leases.

Q. No leases?

A. No leases.

Q. Did you formerly lease cars?

A. We have leased cars, yes.

Q. When did you stop that?

A. About a year ago.

Q. What was the arrangement between June 19, 1936, and the time you stopped leasing cars?

A. I am not certain of the dates but when we leased cars we charged the buyers a dollar a day for the rental.

Q. What about the mileage?

A. There is no mileage.

Q. What was the advantage in leasing of cars from the customer's standpoint?

A. That—they principally leased them on price  
167 changes, advances.

Q. What is that?

A. They principally leased in a price advance in order to get additional goods, and when the—

Q. Will you explain that a little more?

A. In other words, when there was a product—when there was an advance in price buyers would buy goods at the lower price and their system could only hold a certain amount of corn syrup and at such times they would lease tanks and let them stand on their siding.

Q. Mr. Mueller, do you have in mind any customers who, when a price advance occurs are granted more than five days in which to buy at the old price?

A. No.

Q. Do you have in mind customers who have taken or paid the old price when more than five days elapse?

A. No.

Q. Do you have a record of such matters?

A. No, we do not.

Q. Do you have in mind any shipments that have been made at a greater period of time than thirty days from the date of the order?

Mr. Hall: What is that question?

(The question was read as above set forth.)

The Witness: Yes, but as a general condition, 168 usually at an advanced price we would have a heavy influx of orders and it is almost impossible for the factory to get them out within the thirty day period and some of our bookings would extend beyond the thirty day period.

By Mr. DeBirny:

Q. What company's bookings or purchases do you have in mind?

A. I do not have any, it is a general condition.

Q. Is that always the result of conditions at your factory or is it at the request of customers?

A. Generally, a factory condition.

Q. Do you have in mind any instances where it was not due to a factory condition?

A. No.

Q. Who handles the confectionery trade sales?

A. Well, do you mean, in our office?

Q. Yes.

A. Mr. Schmidt handles them.

169 Q. Do you know, Mr. Mueller, whether the brewery trade buys at other than the thirty day delivery basis?

A. The brewery trade buys for shipment within thirty days.

Q. Do you know that definitely?

A. Yes.

Q. Do you know, definitely, that your company sells to your brewery customers and delivers to them within thirty days?

A. Yes, but that same factory condition applies to the brewing industry. Their shipments due to a factory condition, may delay beyond the thirty day period. They buy for shipment within thirty days.

Q. Do you sell the Curtis Candy Company anything other than dextrose?

A. Yes.

Q. What?

A. We sell them some corn syrup.



Q. You sell them some refined sugar, also?

A. That is dextrose.

Q. That is dextrose?

A. Yes.

Q. Principally, what product do you sell them?

A. Dextrose.

Q. Do you know of any instance where companies purchase forty-two degree corn syrup, unmixed and obtain a higher grade syrup or higher priced syrup?

170 A. That question is rather conflicting.

Q. Yes. I will split it up. Do you know of any instance where companies purchase forty-two degree corn syrup unmixed and obtain a higher grade?

A. No.

Q. With regard to starch I will ask you do you know of any instance where companies purchase forty-two degree cornstarch and obtain a higher grade?

A. The same applies to starch.

Q. Are dextrose and corn syrup used by the confectionery manufacturers interchangeably?

A. I could not answer that. It is rather technical.

Q. Well, when you go to a customer who is using corn syrup do you seek to have that customer purchase dextrose in lieu of corn syrup?

A. We may ask him to do that and we may ask him to replace sugar with that, but so far as mixing of candy is concerned that is rather technical and I would not know anything as to when they use dextrose if they are subtracting from the amount of corn syrup they would ordinarily use with the cane sugar.

Q. When you say "sugar"; you mean cane sugar?

A. Yes.

Q. Do you render any services such as technical services to any of your customers?

A. Yes.

171 Q. Do you have in mind any particular customers that you render any such services to?

A. It is open to all of our trade.

Q. I say, do you have in mind any particular customers that you render any such service to?

Trial Examiner Diggs: He says he renders it open to all the trade.

By Mr. DeBirny:

Q. I am asking you do you have in mind any particular customers that you render this service to?

A. Well, I would have to bring down a list there for all of our customers. We have a technical service for textile mills, the candy trade, and the paper trade.

Q. What kind of service do you render?

A. Send the man down there to show them how, possibly, to improve their products.

Q. How many men do you have?

A. On our technical service department I do not know exactly, but we must have ten or fifteen—twelve or fifteen.

Q. Do you keep one man at any of those plants?

A. At customer's plants?

Q. Yes.

A. Yes, until the job ends, not indefinitely, however.

Q. Simply while they are down there teaching something?

A. Yes, sir.

172 Q. And that is open to all of your customers?

A. Open to all of our trade, yes.

Q. Do you know, Mr. Mueller, what date you ceased selling to confectioners located in Milwaukee, Wisconsin at the same delivered price that you sold to confectioners located in Chicago?

A. I do not know the exact date but it was about a year ago.

Q. Do you have a zone around Chicago in which you sell to customers at the same prices at Chicago?

A. No, the ones in Chicago in the switching district they were sold on the Chicago basis.

Q. Were there any other points in the United States in which you sold at other than the Chicago-factory price plus the freight—

A. No.

Q. (Continuing.) —tariff?

A. No, no.

173 By Mr. DeBirny:

Q. I will ask you this question, Mr. Mueller.

A. Yes.

Q. Do you have in mind or do you know of any point in the United States at which the products were sold by the Corn Products Refining Company other than this point within the Chicago Zone at a price which solely reflected the Chicago-factory price plus the freight tariff, to the point of destination?

A. There are no points now that we are selling.

Q. Do you know of any that you sold that subsequent to June 19, 1936?

A. I do not know. I would have to look up the records on that.

Q. What point do you have in mind?

A. Danville, Illinois, and Bloomington, Illinois. Now, my memory is not clear whether we have sold—

Q. (Interposing.) —do you have—

A. —at the time you mentioned.

Q. Do you have any other points in mind?

A. Those are the only two points in mind.

Q. Mr. Mueller, I am including feed?

A. Oh, we do not—

Q. In that question.

A. —I meant that I do not know anything about feed.

174 Q. What products do you know, definitely, about?

A. Starch, corn syrup unmixed.

Q. Anything else?

A. Dextrine.

Q. Anything else?

A. Sugar, 70 sugar and 80 sugar.

Q. Who would know, Mr. Mueller, when you ceased selling in the Chicago—so-called Chicago zone and possibly to those two accounts in Illinois just mentioned—

A. It is a matter of record. I can get that record.

Q. Can you get that record and let us know this afternoon?

A. Yes.

Mr. Hall: Mr. DeBirny, is that company—

Mr. DeBirny (interposing): I would like to add to that, "at the Chicago price."

The Witness: I think I previously said we are selling at the Chicago price—in the Chicago zone at the Chicago price.

175 Q. Mr. Mueller, do you know that Corn Products Company sends every day at the termination of the day the prices at which it has sold, to the Corn Statistical Bureau in Chicago?

A. Yes, we do.

Q. And when—and as the result of that arrangement you receive inquiries from your competitors or others transmitted through the Statistical Bureau with regard to different prices other than the regular and customary prices; do you file such inquiries?

A. Yes, sir, we file them.

Q. Do you maintain a particular file for such inquiries?

A. Yes, we have a file of them.

Q. Can you bring that file this afternoon, also?

A. Yes. It will only go back for, possibly, four or five months or something like that.

Q. And prior to that time what happened to them?

A. It was stored.

Q. Well, will you bring the record for the past four or five months?

A. Yes.

Q. In making the discount to the Baking Powder Companies is any particular volume specified at which a discount may be obtained?

A. No, sir.

Q. No.

176 Q. What product do you sell to the Baking Powder Companies?

A. Buffalo X starch and Buffalo XX starch.

Q. Oh, I beg your pardon. I asked you that before.

A. I would like to change that answer to read Buffalo XX starch and Buffalo XXX starch.

Q. Do you know whether the Huron Starch Company and the Keever Starch Company has sold starch to Baking Powder Manufacturers?

A. I do not know.

Q. What is Hercules Gum, Mr. Mueller?

A. It is one of the Huron Milling products and I could not explain it.

Q. Do you make a similar product under your own name?

A. No.

Q. No.

A. No.

Q. Do you know what trade uses that product?

A. I am quite sure it is a paper trade product; I am quite sure the paper trade uses it.

Q. The paper trade?

A. The paper trade.

Q. Do you sell any gum to the paper trade?

A. Yes, starches; yes, we sell starches and some dex-  
trines to the paper trade.

Q. I say: Do you sell any gum to the paper trade  
177 or is my question improperly framed?

A. Your question is not exactly correct. You are

going to a technical matter. We often refer to our dextrine as a gum.

Q. You often refer to your dextrine as a gum?

A. We often refer to our dextrine as a gum.

Q. Is Hercules Gum a dextrine?

A. I do not know. I am not familiar with the manufacturing processes involved.

It has been on the market as "Hercules Gum" so I will not dispute whether it is a gum or a dextrine or whether it is a starch.

It is just a trade name.

Q. Do you seek to obtain the same business that the distributors of Hercules Gum seek to obtain?

A. Yes.

Q. With what product?

A. Starches and dextrines and all of that business is competitive as far as we are concerned.

Q. You can use a starch or a dextrine in lieu of the gum?

A. Not with the same result.

Q. How do you say it is competitive?

A. It is competitive, some mills may be able to use  
178 our product to replace "Hercules Gum" while others would not have that success.

Q. Do you hold office in any of the subsidiaries of Corn Products Company other than in the sales company?

A. No.

Mr. Hall: What was that question?

(The reporter read the question as above set forth.)

By Mr. DeBirny:

Q. Since June 19, 1936, have mixers of syrup obtained any price determined upon the use to which they put the syrup or glucose?

A. Will you repeat that, please?

Q. Since June 19, 1936 have mixers of syrup obtained any price dependent upon the use to which they put the products?

A. Did you say special price or higher value there?

Q. No, price.

A. In other words, there is no special price to any single trade.

Q. No difference? What I want to know is are there any differences dependent upon the use to which the product is put that will effect the price?

A. No, no.



Q. Do you know how many pounds are in a barrel of glucose?

A. Well, it will average about 675 pounds.

Q. Do you know when you ceased making installations for the handling of glucose?

179 I do not know the exact date, offhand, but I would say it was about two or three—about three or two or three years ago.

Q. What was that?

A. I say I do not know the exact date offhand, but I would say it was about, about three years—two or three years.

Q. Do you know whether there is an absorption in the transfer charges at Chicago in the sale of goods?

A. Will you repeat that, please?

Q. Do you know whether there is an absorption in the transfer charges at Chicago in the sale of goods?

Trial Examiner Diggs: I suppose you are talking about sales of goods of his company; are you not?

Mr. DeBirny: Yes, of course.

Mr. McCollester: What transfer charges do you refer to?

Mr. DeBirny: Railroad transfer charges.

The Witness: By whom?

Mr. Hall: What do you mean by absorption?

Mr. McCollester: Absorbed by whom?

Mr. DeBirny: By the Corn Products Refining Company.

Mr. Hall: Do you mean that—

Trial Examiner Diggs: Wait a minute.

Mr. DeBirny: He can say yes or no that he does not understand.

180 Mr. McCollester: I think we ought to understand the question.

Trial Examiner Diggs: I am willing to let this much stay on the record but if you are going to keep on I cannot. Why do you not reframe the question or do something with it, put it in some way for the record so that we can know what we have been talking about here, and, in this case, so the record will be clear.

Mr. DeBirny: I think it is clear but I will reframe the question.

By Mr. DeBirny:

Q. Do you know what is meant by "absorption of freight charges"?

A. No, I do not understand that.

Mr. DeBirny: I will get Mr. Gaynor.

Mr. Hall: Don't you mean, Mr. DeBirny, whether the price at Chicago includes the transfer charge?

Mr. DeBirny: That is what I mean but I doubt if he would know about it.

Mr. Hall: Well, he knows whether the customer—

The Witness: No, no, I never heard of the expression before, to be frank with you.

Mr. Hall: I think he would know whether the customer is charged with additional price or not on that basis. In other words, I think he would know whether there was an additional charge on that ground.

By Mr. DeBirny:

Q. With regard to the sales of dextrose by the American Maize Company, do you seek to sell to the same customers that they sell to?

A. Yes.

Q. Do you make any consignment sales of bulk products?

A. No.

Q. No.

A. No.

Q. Have you made any since June 19, 1936?

A. No. Now, when you are speaking of "bulk products" do you have in mind that you are referring to corn syrup and starches?

Q. I am referring to all bulk products other than feeds?

A. All right, and package goods of course.

Q. That is in bulk products?

A. Yes.

Q. Do you pay brokerage on the purchases made by any of your large customers?

A. Are you referring to brokers that we may have in different cities; we have a number of brokers representing us.

Q. Yes, I am referring to them and any other people you pay brokerage to.

A. We pay brokerage to some brokers who may make sales to our customers.

Q. Do you pay brokerage on any sales to your biggest buyers?

Mr. McCollester: I object to that, "Biggest buyers" is a relative term.

By Mr. DeBirny:

Q. Do you pay brokerage to anyone on the purchases made by your largest buyers?

A. No, no, not to the largest buyers.

183 Mr. Hall, Well, I don't—

By Mr. DeBirny:

Q. When your salesman goes out to sell glucose or starch or any other product that your company sells in the bulk line, how does he know what price to charge the customer?

A. We supply him a price list.

Q. Do you supply him a price list for every town in the United States?

A. Every town that he covers, yes.

Q. How are those price lists constructed; by zones?

A. No.

Q. By what?

A. The Chicago price plus the published freight rate.

Q. No. That is not what I mean.

A. No?

Q. Do you have all of the towns and cities within the State on one level or do you have any particular area where you supply this information and in one sheet; on one sheet of paper, we will say?

184 By Mr. DeBirny:

Q. Mr. Mueller, do you supply a sheet of some kind to your salesman and to your representatives?

A. Yes, to our salesman or representatives as the case may be.

Q. Do they represent your prices so that your representative is furnished with the prices in all of the towns in his territory?

A. That is correct.

Q. Mr. Mueller, will you state how many territories you have?

A. Well; in fact, our territory is the whole United States.

Q. Do you divide the United States into territories?

A. Not exactly. We do not divide it up into territories. It is this way: We have a sales representative who is located in the larger towns and they of course have a certain territory to cover which they cover.

Q. As an illustration, if a man wanted to purchase some glucose at, for instance, we will say the town of New Haven, Connecticut, what price would this salesman quote to the customer he was seeking and how would he know just exactly what to quote him?

A. As I said, New Haven, Connecticut happens to take the same rate as the entire New England territory and therefore the salesman would quote him the regular 185 New England market price on that goods that he was seeking to sell him.

Q. Does every point in New England take the same price, Mr. Mueller?

A. There may be a few points in country places where they may get a higher price but most all of the border points in New England take the same freight rate.

Q. What other rates do you have; in other words, in what other areas of the country do they take a similar freight rate or rates; for instance, does the Pacific Coast?

A. Oh, yes, the Pacific Coast, to my recollection, takes the same freight rate.

Q. Suppose a customer were located in Harrisburg, Pennsylvania, how would you determine what to charge that customer?

A. Well, I mentioned before the regular price plus the published freight rate.

Q. Would the salesman carry with him a book of freight charges?

A. No, they have prices. They have prices for the different markets. In other words, they have a price for the Harrisburg market.

Q. Is a price list constructed for every market in which the customer is located?

A. Yes.

Q. How many of those price lists, then, do you publish or construct?

186 A. Offhand I would say forty to fifty.

Q. Can you bring us this afternoon a copy of each one of your current price lists?

A. Yes.

Q. Or, if it is more convenient to bring us one group for any period during the past year.

Mr. Hall: You have got one right there.

Mr. DeBirny: I know, but I want each, one of each of these for the whole United States.

Mr. Hall: That is all right if you want one, we will furnish it to you.

By Mr. DeBirny:

Q. Referring to Commission's Exhibit No. 4, this simply covers two towns?

A. Yes.

Q. What have you—what do you have here?

A. I now have a copy of the list sent to San Francisco, and some of those towns.

Mr. McCollester: Do you attempt, from the New York office, to go to every town in the United States and see what the price is?

The Witness: That is right, and we send that to our branch office.

Mr. Hall: And would the branch office in turn, issue a price list for its territory?

187 The Witness: It would.

By Mr. DeBirny:

Q. Do you give the information first; you give that data to the branch office; don't you?

A. Yes.

Q. That is what I want.

A. Oh, yes. That is correct.

Mr. Hall: That is right. I just wanted to get it clear what you wanted us to furnish.

Mr. DeBirny: What?

Mr. Hall: That is what I wanted to get clear.

By Mr. DeBirny:

Q. You will bring us a copy this afternoon?

A. I will.

Mr. Hall: Very well, that is what I wanted to know, just what to bring.

By Mr. DeBirny:

Q. Do you have in mind what we want this afternoon from you?

A. Yes. I have it.

Trial Examiner Diggs: Gentlemen, if we are going to have more of this, I am going to go off the record, because I do not think that this is very material.

Mr. DeBirny: Oh, that is all I have in that regard.

188 Trial Examiner Diggs: Very well, otherwise we will go off the record.

By Mr. DeBirny:

Q. Are you familiar with your confectionery customers' names?

A. Pretty well.

Q. Do you sell to Bishop & Company of Los Angeles, California?

A. What is the name?

Q. Bishop & Company.



A. Bishop & Company, yes. We do not sell them all but we sell them part of their requirements.

Q. Do you sell to General Food Products Company of Los Angeles, California?

A. Occasionally.

Q. Do you sell to the Pacific Coast Candy Company of San Francisco, California?

A. Also, occasionally.

Q. Do you sell to Bunte Brothers in Chicago, Illinois?

A. No.

Q. Do you sell to Kraft-Phenix of Chicago, Illinois?

A. No.

Q. Do you sell to John Krenz in Chicago?

A. I do not believe so.

Q. Do you sell to Mars?

A. No.

Q. Do you sell to Shotwell?

189 A. Yes.

Q. Do you sell to Wilson Candy Company?

A. No.

Q. Do you sell to Consolidated Biscuit Company of Louisville, Kentucky?

A. I do not think so.

Q. Do you sell to Schrafft of Boston?

A. No.

Q. Do you sell to United Drug Company of Boston?

A. No.

Q. Do you sell to Page and Shaw?

A. I do not think so.

Q. Do you sell the New England Confectionery Company at Cambridge, Massachusetts?

A. You are referring to all products, now?

Q. Any products.

A. We sell them occasionally.

Q. Do you sell to the Battle Creek Food Company?

A. I do not think so.

Q. Do you sell to Griggs, Cooper & Company of St. Paul, Minnesota?

A. I do not believe so.

Q. Do you sell to the St. Paul Food—

A. What was that company?

Q. Never mind. Do you sell to the Sanitary Food Manufacturing Company of St. Paul?

190 A. No. We do not sell them.

- Q. Do you sell Fred Harvey, at Kansas City?  
A. No.  
Q. Do you sell Rockwood & Company of Brookline?  
A. Yes.  
Q. Do you sell Borden Company?  
A. Occasionally.  
Q. Do you sell to Duche?  
A. I do not think so.  
Q. General Foods, New York?  
A. Occasionally.  
Q. Habecht Braun?  
A. I do not think so.  
Q. Huyler's?  
A. We sell them occasionally.  
Q. National Distillers?  
A. I do not think so.  
Q. Runkels?  
A. Runkels, which Runkels?  
Q. R-u-n-k-e-l.  
A. New York City, yes.  
Q. Anywheres else?  
A. Yes.  
Q. Fannie Farmer?  
191 A. —Excuse me. We sell them in New York.  
Q. Fannie Farmer?  
A. Occasionally.  
Q. Durkee's Famous Foods?  
A. I am not sure.  
Q. The Glidden Company?  
A. I am not sure.  
Q. Weyman Company?  
A. I am not sure.  
Q. Do you have in mind any customers that you sell to in Cleveland, Ohio?  
A. Yes, sir. The Kroager Grocery & Baking Company —that is Cleveland, you say?  
Q. Cleveland, Ohio.  
A. Strike that out; that is not correct; I do not know of anything we sell there.  
Q. Do you sell to Kroager of Cincinnati, Ohio?  
A. Yes.  
Q. Do you sell to the American Caramel Company of Lancaster, Pennsylvania?  
A. No.

Q. Have you sold to them since June of nineteen—June 19, 1936?

A. We may have made a sale; I am not sure.

Q. Have you sold to Blumenthal Brothers?

192 I do not remember.

Q. Whitman, of Philadelphia?

A. Occasionally.

Q. Ramer of Philadelphia?

A. Yes.

Q. Albert Phinney of Memphis?

A. No.

Q. The Brown Cracker & Candy Company, Dallas?

A. I do not remember whether we did.

Q. J. G. MacDonald and Company of Salt Lake City, Utah?

A. I do not remember.

Q. Who would know?

A. It is a matter of record. I can look it up.

Mr. Hall: Give me the list and I will have it checked for you if you want to.

By Mr. DeBirny:

Q. Do you sell the Wholesome Products Company of Milwaukee, Wisconsin?

A. I do not think so.

Q. Do you sell any goods, or have you sold any goods since June 19, 1936 to Stein-Hall and Company?

A. Yes.

Q. What products?

A. Starch and a product called Amijel.

Q. Do you sell them here or in Chicago or do you 193 distinguish between Stein-Hall and Stein-Hall Manufacturing Company?

A. They buy in both places. They buy in New York and also in Chicago.

Q. All right.

A. Yes.

Q. Do you know whether or not, since June 19, 1936, Stein-Hall Company or Stein-Hall Manufacturing Company has obtained any special price concession from Corn Products Refining Company?

A. Yes, they have.

Q. When?

A. A commission; sales commission.

Q. On what products?

A. Starch and these two products that I mentioned.

Q. Will you amplify your answer a little more? I do not understand what you mean by "sales commission."

A. Well, it is a commission they get from us. They resell our goods.

Q. Do they get a commission from you on goods that they purchase and resell?

A. That is right.

Q. What is the percentage of the commission?

A. Fifteen cents a hundred.

Q. Fifteen cents a hundred?

A. Fifteen cents a hundred pounds.

194 Q. On all products?

A. Yes.

Q. Do you have any other customers that are similarly treated?

A. No. In fact, I do not know of any other customers in the same line of business.

By Trial Examiner Diggs:

Q. Is that a commission that is paid direct to them?

A. That is right.

Q. Have you any concern or anything to do with the sales that they make of your product? That is, after they buy it from you?

A. No.

Q. That is not taken into consideration in this commission; is it?

A. I would say it is a commission because they re-sell this product in the open market, and, in general, to any consumers.

Q. After the sale is consummated between you and them, why, that ends it, so far as you are concerned?

A. Yes, sir.

Q. Then, you give them a commission on the amount purchased from you?

A. Yes.

Q. Which has nothing to do with their sales to somebody else?

A. That is right.

195 By Mr. DeBirny:

Q. Do they get similar allowances on package goods?

A. I do not think so. I do not know. I do not think we sell them package goods now. I am not familiar with that.

Q. Do you know whether or not this fifteen cents a hundred which is allowed to Stein-Hall—I withdraw that—strike that question.

A. What is that?

Q. Do you know whether or not this fifteen cents a hundred which is allowed to Stein-Hall is allowed on purchases at Chicago as well as purchases in New York?

A. Those two offices cooperate.

Q. In your sales to them do you distinguish between the Stein-Hall Company in New York and the Stein-Hall Manufacturing Company at Chicago, Illinois?

A. I believe everything is charged to Chicago—

Q. To the manufacturing company?

A. Or to the—

Q. To the manufacturing Company?

A. I do not remember that.

Q. I see.

A. No. I do not remember that.

Q. Did I ask you whether you have such an arrangement with any other of your customers?

A. I beg your pardon?

196 Q. Did I ask you whether you have such an arrangement with any other of your customers?

A. Yes, and I said we did not.

Q. Do you know whether or not this arrangement is pursuant to any written contract or understanding?

A. There is no written contract that I know of.

Q. Who would definitely know?

A. Well, I would know and I do not know of any written contract.

Q. Or letter setting forth the arrangement?

A. That is right.

Q. You know of none?

A. That is right.

Q. What is the percentage of brokerage paid on your products to your brokers?

A. I would have to check that.

Q. Does it vary with different products?

A. Yes. It is so much per package, as a rule.

Q. I am talking about bulk products.

A. That is right.

Q. So much per car or so much per barrel?

A. So much per barrel on corn syrup; so much per bag on starch.



Q. Does it exceed or is it less than the fifteen cents allowed to Stein-Hall?

197 Mr. Hall: Don't you know?

The Witness: It is less than what we pay our regular brokers.

By Mr. McCollester:

Q. You mean the Stein-Hall is less?

A. Yes—well, wait a minute, please. No, it is more than what we pay our regular brokers.

By Mr. DeBirny:

Q. This fifteen cents is the fifteen cents, or is it the fifteen cents that has been paid, regularly paid since June 19, 1936 or was there some other and different arrangement—

A. As far as I remember.

Q. —or is it the same?

A. It has been fifteen cents since 1936.

Q. Do I understand or do you intend to convey by your previous answers that there are no restrictions as to the price at which Stein-Hall & Company shall sell or shall resell products which they purchase from you?

A. That is right.

Q. In selling products to Stein-Hall to whom do you make shipments?

A. Direct to Stein-Hall.

Q. You never make shipments to their customers?

A. No.

Q. In selling your bulk products other than feed to 198 customers do you invariably make shipments to those customers?

A. Yes.

Q. Do you know—do you have in mind the names of any of your customers who do not buy and pay for the goods within the customary ten day period and who did obtain the two per cent. cash discount?

A. No. The credit department would know.

By Trial Examiner Diggs:

Q. What shipments to Stein-Hall are made from nearby plants; in other words, on these shipments to Stein-Hall, where are they made from, generally speaking?

A. From Argo, Illinois and from Pekin, Illinois.

Q. To where?

A. To Chicago, principally.

Q. And some to New York?

A. Very seldom, I do not remember any shipments going to New York.

By Mr. DeBirny:

Q. Who would know where those shipments go?

A. It is a matter of record.

Q. In your office?

A. Yes.

Q. Is there any difficulty in obtaining that information quickly?

A. No.

199 Q. Will you make a note and advise us of that this afternoon, also?

A. Yes.

Q. Mr. Mueller, referring to Commission's Exhibit 2-A, 2-B and 2-C, which is a list of trades to whom you sell; are you familiar with the names of your largest customers—when I say "largest customers" I mean those who purchase the largest amount from you—of asbestos, wall-board, and gypsum?

A. Yes.

Q. Will you name them?

A. U. S. Gypsum Company.

Q. What other companies?

A. And the National Gypsum Company.

Q. Is Johns-Manville one of your largest customers?

A. No.

Q. Do you sell to them?

A. Yes, occasionally.

Q. Do you sell to Certainteed Products Corporation?

A. Very little.

200 By Mr. DeBirny:

Q. Do you recall any of your other large customers in that trade?

A. No, sir.

Q. In that trade?

A. No, I don't.

Q. Taking the baking industry, trade number 2, where are your largest customers in that trade?

A. Continental Baking, and Ward Baking Company.

Q. Do you sell to a number of other and smaller bakers?

A. Yes.

Q. In selling to Continental and Ward, do you make deliveries to all over the United States?

A. To their different branches, yes.

Q. Who are your largest customers in trade number 6. that is brewers?

A. Yes, I have it here.

Shaeffer Brewing Company.

Q. Where are they located?

A. In Brooklyn.

Q. What others?

A. And the Narragansett Brewing Company.

Q. Where are they located?

A. In Providence.

Q. Do your customers in New York and Providence  
201 pay the same delivered price for their goods?

A. No, there is a difference between New York and New England. There is about two cents a hundred difference. New England takes about a two cent higher freight rate.

Q. On what products?

A. Practically everything.

Q. When corn products are sold in New England and New York, do you know whether the freight rate is the freight on corn, or on the particular product?

A. The product.

Q. What do you sell to the brewers?

A. Seventy and eighty sugar.

Q. That is manufactured where?

A. At Pekin, Illinois.

Q. In selling and pricing your goods on a Chicago price plus the freight schedule do you take one hundred per cent. of the freight schedule, or do you sell at one hundred and eight per cent?

A. Well, on bag goods it is the exact rate, one hundred per cent.

Your one hundred and eight per cent., no doubt, is referring to some barrel shipments. There is eight per cent. added on barrels due to the wear of the barrels.

Q. Who are your principal customers in trade number  
71

A. Offhand, there are not any to amount to anything.

Q. Returning to trade number 6, do you have any  
202 customers west of Chicago?

A. Yes.

Q. Who are they?

A. I can't give you that.

Mr. DeBirny: Will you furnish me that information in a letter, Mr. Hall?

Mr. Hall: What is that?

Mr. DeBirny: The names of your brewing customers west of Chicago, particularly Kansas City and that vicinity.

By Mr. DeBirny:

Q. Referring to trade number eight, caramel color manufacturers, who are your principal customers?

A. Berghausen.

Q. Where?

A. Cincinnati.

Q. Do you have any west of the Mississippi, that you can recall?

A. I don't recall any west of there, no, sir.

Q. To whom do you sell other than Berghausen?

A. D. D. Williamson & Company.

Q. Where are they located?

A. At Brooklyn.

Q. Referring to trade number twelve, explosives, to whom do you sell?

A. Practically none.

203 Q. Referring to trade number thirteen, farmers and feeders?

A. Practically none.

Q. Now, you are referring to glucose, of course?

A. All bulk products, outside of feed.

Q. What about trade number fourteen, feed manufacturers?

A. Well, that is handled by the feed department. All feed concerns are handled by our feed department.

204 Trial Examiner Diggs: We will adjourn for lunch. We will adjourn until two o'clock p. m.

(Whereupon, at 12:40 p. m. a recess was taken until 2:00 o'clock p. m.)

205 Afternoon session at 2:00 p. m.

Trial Examiner Diggs: On the record.

FRED MUELLER resumed the stand and testified further as follows:

*Direct Examination by Mr. DeBirny (Continued).*

Q. Mr. Mueller, do you sell any bulk products to the tire companies?

A. We sell some starch, that doesn't amount to much business.

You said, "tire," didn't you?

Q. Yes, to the Goodrich Company?

A. Yes, we sell them a little starch.

Q. What do you mean when you say it "doesn't amount to much," what do you mean by that?

A. I would say in a year's time it would not amount to more than five car loads.

Q. To one company, or all together?

A. I would say to one company.

Q. Do you sell more than five car loads to any one company?

A. I would say, no.

Q. Where are the companies located that you sell to?

A. The Goodrich Company—

Q. They are one. Are all of them in the vicinity of 206 Akron, or do you sell to them in other parts of the country?

A. I believe we have a concern we are selling to down in New England. I don't remember the name.

Q. In New England?

A. Yes.

Q. Is the Lee Company located in New England?

A. I don't know.

Q. Under Trade Number 16, flour mills, who are your principal customers?

A. We sell Pillsbury.

207 By Mr. DeBirny:

Q. Mr. Mueller, what other flour companies do you sell to besides Pillsbury?

A. I really don't know the names of them. There are not many flour companies that we sell to.

Q. With reference to trade number seventeen, do you sell much of your products to that trade, the foundry and foundry supply trade?

A. Well—

Q. Do you sell any appreciable quantity of goods to the foundry and foundry supply trade?

A. We sell the automobile trade some Mogul, but as far as Dextrin goes, we don't sell much of that to the foundry trade.

Q. Yes.



208 A. I presume under that you include the automobile people.

Q. Are all the customers who purchase Mogul and are engaged in this trade, No. 17, sold at the same price for goods of like grade and color and quality; just make it goods of like grade and quality.

A. Chicago plus freight; that is right.

Q. There are no volume on quantity discounts?

A. No.

Q. With regard to trade No. 18, jams, jellies, and preserves who are your largest customers?

Mr. McCollester: Mr. Examiner, may the record show my objection to this same line of questions and answers with regard to the names of customers.

Trial Examiner Diggs: The record will note your objection to each of these questions and answers and an exception noted.

I wish the record would show in a little more detail just what you are talking about when you say that these prices relate to this trade and that trade, just what it is indicated, or just what it means by that. I do not think the record is going to be very clear if we just have the numbers in there like Trade No. 18 and so forth.

By Mr. DeBirny:

Q. Please answer the question.

A. Joseph Middleby, Incorporated, Boston, Massachusetts.

209 Q. That is your largest customer?

A. Yes, sir. I would say so.

Q. Do you have any customers located in the southwestern part of the United States that are engaged in that trade?

A. Not to my recollection.

Q. And in California.

A. Not to my knowledge.

Mr. DeBirny: At this point, then, for the clarity of the record all of these names and questions relate to Commission's Exhibit 2-A, 2-B, 2-C, and 2-D and to the trades listed and set forth in this exhibit.

By Mr. DeBirny:

Q. With regard to trade No. 19, laundries and laundry supplies to whom do you sell the largest quantity?

A. Well, we do very little laundry business.

Q. With regard to Trade No. 20, are any appreciable quantities of goods sold for that trade classification?

A. No.

Q. With regard to Trade No. 21, syrup mixers, who are your principal customers?

Mr. McCollester: I just want it understood that my objection goes to this entire line of testimony.

Trial Examiner Diggs: Yes, your objection is noted to this entire line of testimony, and your exception also.

210 The Witness: Mangels-Herold of Baltimore, Maryland, I would say they are our largest customers.

By Mr. DeBirny:

Q. What do they purchase?

A. Corn syrup unmixed.

Q. Where is that corn syrup generally produced?

A. Argo.

Q. Do you sell to any syrup mixers in the southwestern part of the United States, take Texas, Oklahoma, or in that neighborhood?

A. I do not remember that we do. We sell very little to syrup mixers.

Q. Do you sell to syrup mixers located in Colorado?

A. I do not remember that we do.

Q. In California?

A. I don't remember that either.

Q. With regard to Trade No. 22, oil packers, and so forth, is any appreciable quantity of goods sold to them?

A. No.

Q. With regard to Trade No. 23, oil cloth and linoleum—

A. The same applies to that.

Q. Who are your principal customers in Trade No. 23?

A. Who are the customers, who are they?

Q. With regard—

A. I do not remember who are the customers, I do  
211 not remember who they are in that Trade No. 23.

Q. With regard to Trade No. 24 do you sell in large quantities to Laminators?

A. Not much.

Q. What do you mean by "not much"?

A. Well, we only have a few customers using our product for laminating purposes.

Q. Are they all located in the eastern part of the United States?

A. No, in the west.

Q. What is their name?

A. Hummel & Downey, and we sell the Kellogg outfit; they are the principal users.

Q. What does Hummel & Downey do with the goods?

A. What is that?

Q. What does Hummel & Downey do with the goods?

A. I think they use them for pasting purposes, laminating, pasting cardboards together.

Q. With regard to Trade No. 27, who are your largest customers?

A. The Strathmore Paper Company.

Q. Where are they located?

A. Mitteneague, Massachusetts.

Q. Who is your next largest customer?

A. I beg your pardon?

212 Q. Who is your next largest customer in the paper trade?

A. The International Paper Company.

Q. Where are they located?

A. They are in New York City.

Q. Do either one of these companies get any discounts or preferences in price?

A. No.

Q. Do either one of these companies get any preference in price over the other one, I mean to say?

A. No.

Q. Trade No. 28, what is the distinction between Trade No. 28 and Trade No. 24?

A. Well, corrugated boxes is a box with a little scallop, and the laminated is just the straight board.

Q. They are both cardboard box manufacturers?

A. Yes, sir.

Q. What is the difference between Korgum and No. 3706 Gum?

A. It is in the character of the product.

Q. With regard to Trade No. 32, rayon manufacturers, to whom do you sell?

A. The Viscose Company.

Q. What other company?

A. The DuPont Company.

Q. What other company?

A. The New Bedford Rayon Company.

213 Q. With regard to Trade No. 33, soap manufacturers, do you sell an appreciable quantity of goods to them?

A. Practically nothing.

Q. Starch packers, Trade No. 35, to whom do you sell?

A. We have very little business with the starch packers.

Q. To whom do you sell?

A. Now, I do not remember the names of the starch packers.

Q. Is Stein-Hall a starch packer?

A. I do not know.

Q. With regard to Trade No. 37, textiles, who are your principal customers?

A. Pacific Mills.

Q. Where are they located?

A. They are in Boston.

Q. All right. Now, who is the next?

A. The Pepperell Manufacturing Company.

Q. Where are they located?

A. They are also in Boston.

Q. Next?

A. I think the Erwin Mills down in Durham, North Carolina.

Q. What do you sell to the textile manufacturers, principally?

A. Starches, principally.

Q. Do you compete with the Keever Starch Company or the Huron Starch Company in the sale of starches to textile mills?

A. Yes.

214 Q. Mr. Mueller, will you look over the rest of those Trades listed on Commission's Exhibit No. 2-A, 2-B, 2-C, and 2-D; these sheets here, from Trade No. 37 down and tell me to which ones you sell an appreciable amount; appreciably large quantities of goods?

A. We sell the Fleishmann Company.

Q. Sell what?

A. Fleishmann—Standard Brands.

Q. Which trade?

A. That is No. 44.

Q. Whom else do you sell besides Standard Brands?

A. That is practically the only one that amounts to anything on our starches.

Q. On what?

A. On our starches.

Q. Next?

A. The next—we sell the yeast manufacturers very little starch.

Q. What is that?

A. We sell the yeast manufacturers very little starch.

Q. Their buying amounts to very little?

A. Yes.

Q. With the exception of Standard Brands?

A. Even with Standard Brands their volume, the volume is very small.

215 A. Oh, I thought you said that they were a big purchaser.

A. I do not know exactly what you mean by large volume.

Q. Well, we will say \$100,000 or \$200,000 or \$300,000.

A. Oh, well, cut out Standard Brands and you can cut out a lot of the other concerns that you have listed.

Q. All right. Now, will you go down through the rest of those trades and look them over similarly?

A. Well, there are none that we sell that quantity.

Q. Not to the vegetable canners or soup canners?

A. No, we don't; you see, there are none of them that would use that quantity of goods.

Q. Canned fruits and biscuit companies?

A. The National Biscuit Company, is it listed?

Q. No. 59.

A. Yes, National Biscuit Company.

Q. Who else—to whom else do you sell to other than National Biscuit Company in that trade?

Mr. Hall: What is that, biscuit, cracker, cookie trade?

The Witness: There is no other that would use anywhere near that tonnage.

By Mr. DeBirny:

Q. Any other companies—what other companies do you have in mind that do—to—

A. To whom we sell?

216 Q. (Who purchase from you?

A. Holland Biscuit Company.

Q. Where are they located, the Holland Biscuit Company?

A. The Holland Biscuit Company is located in Michigan, I think it is Holland, Michigan, but I am not sure.

Q. Whom else?

A. I do not remember any of the other names.

Q. Did I ask you, Mr. Mueller, whether or not you sell to the Nutrene Candy Company?

A. You did not ask me that.

Q. Do you sell to them?

A. We do sell them.

Q. Now, how are they sold with regard to price?



A. Well, if they—we have a filling station in the same group of buildings where they are located and we pump their corn syrup from our filling station to their plant.

Q. What price do you charge them?

A. Tank car price plus two cents per hundred.

Q. Do they take large quantities of glucose?

A. Yes, they are good sized buyers.

Q. Why do you charge them tank car price plus two cents per hundred?

A. One of our competitors was selling them on that basis.

Q. Well, they take in larger quantities than tank car quantity, do they not?

217 A. They buy quite a few—quite a bit of corn syrup but our tank cars are unloaded into our storage tank and then we pump the corn syrup from our storage tank to their storage system.

Q. Oh, so the glucose comes from the factory of the Corn Products Refining Company to a depot, a bulk plant and then—

A. (Interposing.) To a depot located in Currier-Lee warehouse. That is where our storage system is and we pump the corn syrup from our system into the Nutrene Candy Company's system.

Q. Did you have Nutrene Candy Company as a customer before you had the bulk plant or did you get the bulk plant after you got the Nutrene Candy Company account?

218 A. The Nutrene Candy Company was located there. The Nutrene Candy Company was looking for another source of supply and the only way we could supply them was to put in this storage system.

Q. So, you put the storage in especially to supply them?

A. That is correct.

Q. And you charged them tank car price plus two cents per hundred?

A. Yes.

Q. Do you have similar arrangements with any other customers?

A. We have a filling station in Saint Paul, Minnesota, and the Powell Candy Company is located in that same warehouse and we pump the corn syrup to them from our filling station.

Q. What do you charge them?

A. The same price; tank car price plus two cents per hundred.

By Trial Examiner Diggs:

Q. Is that one hundred pounds?

A. That is one hundred pounds.

By Mr. DeBirny:

Q. Two cents per one hundred pounds?

A. Two cents per one hundred pounds.

Q. I believe I have asked you, Mr. Mueller, all the questions that I want to ask you at this time. I have nothing further for you.

A. Thank you.

Mr. DeBirny: Mr. Examiner, I have asked Mr. Mueller all the questions that I desire to ask him at this time. I will want to recall him at some subsequent time.

Mr. McCollester: He will be available.

Mr. DeBirny: That is all.

Mr. McCollester: I will defer cross examination, if I may.

Trial Examiner Diggs: Is that agreeable to counsel for the Commission?

Mr. DeBirny: It is.

Trial Examiner Diggs: All right, the witness may be excused.

(Witness excused.)

Mr. DeBirny: I will call as the next witness for the Commission Mr. Frederick Sayre.

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FREDERICK MORRIS SAYRE, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

*Direct Examination by Mr. DeBirny.*

Q. Mr. Sayre, will you state your full name, please, sir?

A. Frederick Morris Sayre, but I have not used the Frederick in a good many years; everybody just calls me Morris Sayre.

Q. What position do you hold with the Corn Products Refining Company, Mr. Sayre?

A. Vice President.

Q. Mr. Sayre, what position do you say you hold with the Corn Products Company?

A. Vice President.

Q. Of the Refining Company?

A. Yes.

Q. Did you hold any position with any other corporation that is a subsidiary of the Corn Products Refining Company?

A. Yes. I am a director in two or three of them.

Q. In America?

A. Yes.

Q. What companies?

A. Hummel and Downey, New England Grain Company, Commercial Mills; that is not a subsidiary; I suppose you mean by "subsidiary" one that we control?

Q. That is right.

A. That is all.

Q. How long have you held that—how long have you held your present position with the Corn Products Refining Company?

A. 1908.

Q. Will you give us the background of your experience with the Corn Products Refining Company?

Mr. Hall: Mr. Sayre, did you catch that question clearly; he asked you how long you held your present position with the Corn Products Refining Company.

The Witness: Oh, present position, as vice president, you mean?

By Mr. DeBirny:

Q. Yes.

A. Oh, I have, I think I have been vice president since about 1931 or 1932, maybe about 1933, I am not sure.

Q. Will you give us the background of your experience with the company?

A. I came with the company as a college boy and started Washington boilers in 1908, back in Granite City, Illinois, and became assistant master mechanic, and later, assistant superintendent, and was made superintendent of that plant in 1914. I was superintendent at Argo in 1916, and came here in 1928 from Argo, as a general factory manager.

Q. Have you kept in close touch with manufacturing operations at the various plants of your corporation?

A. Not so closely in recent years because I have spread out into different kinds of work.

Q. What do you mean by that?

A. I am not directing the factories at the present time. There is another fellow doing that particular job.

222 Q. Who is directing the factories?

A. J. L. Buckner.

Q. Is he located in New York?

A. Yes.

235 Q. Do you know, Mr. Sayre, whether or not any other company besides the American Maize Company and yours produces dextrose?

A. The Clinton Company—the Clinton Sugar Refining Company produces dextrose.

Q. Do they produce it under license from your company?

A. No.

Q. Is there any difference between the dextrose produced by the American Maize Company, your company,  
236 and the Clinton Company?

A. That is a very difficult question to answer. If you looked at it, I think you would probably say "No"; but if a chemist looked at it, I think they would say there was.

Q. The dextrose produced by the American Maize Company is produced under your license?

A. Yes.

Q. Would it be the same as yours?

A. Not necessarily.

Q. Is that a different process?

A. No, we use, more or less, the same processes but in the handling of the process and the fact that it is a different water that they use, in a different treatment a chemist would probably pick up the difference and point it out to you.

Mr. Hall: This last question does it relate to the present time or during the last two and one-half years?

237 Mr. DeBirny: During the last two and one-half years.

The Witness: Oh, what was the question?

By Mr. DeBirny:

Q. All of my questions, I would like to say, right now, relate to the period of time from June 19, 1936.

A. Well, that is two and one-half years ago and two and one-half years ago Penick & Ford were making some dextrose.

254 Wednesday, December 7, 1938 at 10:00 o'clock a. m.  
Trial Examiner Diggs: The hearing is called to order.

Mr. DeBirny: I wish to call Mr. Kayhart.

CHARLES T. KAYHART was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

*Direct Examination by Mr. DeBirny.*

Q. Will you state your full name, please, Mr. Kayhart?

A. Charles T. Kayhart.

Q. What position do you occupy with Corn Products Refining Company?

A. I am manager of the feed.

Trial Examiner Diggs: How do you spell your name?

The Witness: K-a-y-h-a-r-t.

By Mr. DeBirny:

Q. For what period of time have you occupied that position?

A. Approximately—about four or five years. I have been in the feed department about thirty-five years, and reached my present position about four or five years ago.

Q. How many competitors does Corn Products Refining Company have in this feed business?

A. Practically everybody that makes any kind of 255 feed is a competitor of Corn Products.

Q. Are there numerous large ones?

A. Well, the cotton seed mill industry is a very large one, it is a competitor, then distillers, soy bean crushers, and wheat flour mills.

Q. I am talking about competitors who produce the same type of goods that you produce.

A. I think there are about six or seven of them.

Q. Who are they?

A. American Maize Products, Anheuser-Busch, Clinton Company, Penick and Ford, A. E. Staley Manufacturing Company, Union Sales Company, and Hubinger Company.

Q. What about Piel?

A. Yes, Piel.

Q. Are you the largest of that group?

A. I believe we are.

Q. Do you produce more than half of all the production in that field?

A. No.

Q. Approximately what percentage do you produce?

A. Oh, probably between forty and forty-five per cent.



Q. How is this feed distributed, from all of your plants, or how?

A. Well, we have feed at all plants where we grind corn.

Q. By that, you mean at Kansas City, Pekin, and Argo?

256 A. That is right.

Q. You do not include Edgewater?

A. No, sir, we do not have any feed there.

Q. Now, when that feed is sold, on what price basis is it sold?

A. It is plus the freight from Chicago on feed produced at Pekin and Argo, and on feed produced at Kansas City we base the freight at—make the price plus the freight from Kansas City to destination.

Trial Examiner Diggs: Those competitors you mentioned, are they all engaged in selling their products in interstate commerce?

The Witness: As far as I know.

By Mr. DeBirny:

Q. They are all nation wide distributors, just as Corn Products are?

A. They practically cover the same territory we do, as far as I know. Maybe not every one of them.

Q. For how many years has your company followed that plan of pricing?

A. As far as my memory goes back.

Q. Have you always priced at Kansas City and Chicago?

A. Yes, sir.

Q. And then to those prices you added the published freight?

257 A. The Tariff freight, rather.

Q. In your industry, or rather in the practices of your company, do you use milling in transit on feed?

A. We do not use it ourselves, we do not use milling in transit on feed.

Q. Well, your company uses it on other products, such as glucose?

A. I would not know about that. I don't know anything about the other branches of the business.

Q. But you do know that you do not use milling in transit on feed?

A. No, we do not.

Q. Do you know why?

A. No.

Q. Do you know why your company, in the sale of glucose and other products, bases the price on Chicago plus published freight, and in feed uses Chicago and Kansas City?

A. I cannot tell you about why they do certain things on other products.

258 Q. Why do they do it on feed?

A. Because Kansas City is a primary market; a primary feed market for feeds like flour mill by-products and cottonseed meal. And, in order to do business there at all we could not make the price plus freight from Chicago, Illinois to that point. That would put us out of that market if we did so.

Q. You say that would put you out of the market, what market do you refer to?

A. Out of the Kansas City market if we maintained a price which was equivalent to the Chicago price plus the freight to Kansas City. Because, as I say, we have to compete with cottonseed meal and wheat feeds which, ordinarily, sell at lower prices at the Kansas City market than they do in Chicago.

Q. Where are the mills located in and around Kansas City, the wheat millers located and the cottonseed cake and meal pressers that produce this flour mill by-products and cottonseed meal that compete with you?

A. I would say that the mills, the wheat mills are at Kansas City, they are located in some of the towns adjacent to Kansas City, and the cottonseed meal comes up from Texas and the southeast.

Q. Are your Chicago and Kansas City prices the same?

A. They are.

Q. Have they been the same for a number of years?

A. I think there have been exceptions when we have  
259 had a surplus of feed at Kansas City, we have made a reduction in price in that area.

Q. When you sell to a customer located in the east do you ship from Kansas City or from Chicago?

A. From Chicago, from Argo, or from Pekin.

Q. In other words, from Illinois?

A. Yes.

Q. You never ship from Kansas City?

Mr. Hall: When you ask that question won't you describe what you mean by the "east"; I do not know what the facts are.

By Mr. DeBirny:

Q. Mr. Hall suggests that I, and probably it would be better if I indicated what I mean by the "east."

A. Yes.

Q. When I say the "east" I mean the eastern seaboard.

A. Well, it would be uneconomical for us to ship from Kansas City past Argo and Pekin. Therefore, we confine, as well as we can, feed produced at Kansas City to an area that is logical from the cost standpoint, to that territory.

Q. When you ship, or if you ship to Cincinnati buyers, where do you ship from?

A. Argo or Pekin.

Q. Do you have a well defined area into which you ship from Kansas City?

260 A. It is fairly developed. I do not think we have made any hard and fast rule on it.

Q. Will you define that area as best as you can remember it?

A. From Kansas City we ship into Texas, Kansas, Nebraska, Colorado, the southeast, to Georgia, Alabama, and the Carolinas; that about covers it.

Q. Do you ship into Virginia?

A. No, not from Kansas City.

Q. Do you ship from Argo into Virginia?

A. Yes.

Q. Where do you ship from into Ohio?

A. Argo or Pekin.

Q. How about Tennessee?

A. Kansas City.

Q. Mr. Kayhart, did you prepare for Mr. Hall a statement as to the feed prices?

A. Yes, to cover a certain period.

Q. To cover the period from 1936 and 1937 up to date; is that correct?

A. I think it is from June 1, 1936.

Mr. DeBirny: At this time I would like to offer the statement prepared by Mr. Kayhart and just identified as Government's Exhibit No. 5, indicating the prices at which feed has been sold at Kansas City and Chicago by Corn Products Refining Company.

261 By Trial Examiner Diggs:

Q. Is the paper which counsel has just handed you the statement which you prepared?

A. Yes.

Trial Examiner Diggs: Any objection, Mr. Hall?

Mr. Hall: No objection.

Trial Examiner Diggs: The document may be admitted and marked as Commission's Exhibit No. 5.

(The document referred to, consisting of four sheets, was marked "COMMISSION'S EXHIBITS 5-A, 5-B, 5-C, and 5-D" in evidence.)

By Mr. DeBirny:

Q. Mr. Kayhart, did you ever sell to customers since June 19, 1936, at a different price from the price set forth in the schedule marked Government's Exhibit 5-A, B, C, and D?

A. No, not actual sales—no actual sales have been made except those.

Mr. Hall: I do not believe the witness understands the question. I ask that it be read to him again.

(The question was read by the reporter.)

The Witness: Those are the prices that I have been governed to buy.

Trial Examiner Diggs: The answer to the question is "yes" or "no"? Read the question again to the witness and let him answer it that way if he can.

262 (The question was read to the witness.)

The Witness: The answer is "no."

By Mr. DeBirny:

Q. Mr. Kayhart, when you say that you did not sell at a different price from that did you consider any allowance or discounts that are taken into consideration in arriving at the final sum paid?

Q. No, I did not. Those come after.

Q. Well, taking into account discounts and allowances do you have in mind the sales of certain feeds, certain feeds to certain customers which result in a different net price from that which you charge other customers for like goods at the same time?

A. Yes.

Q. Will you state what sales you have in mind?

A. There are volume contracts involved with a few customers that call for a discount based on volume.

Q. When you say "volume" do you mean total amount of sales over a period of time or the individual size of the shipment?

A. No, annually, annual volume.

Q. Volume?

A. Yes.

Q. Do you have in mind what the discounts are on those volume contracts?

263 A. No—oh, in one case it is sixty-five cents per ton.

Q. In any other cases?

A. In another case fifty cents per ton.

Q. Any other ones—in others?

A. There is no variation from that.

Q. What are the volumes which have to be attained to receive those discounts?

A. Thirty thousand tons in one case and fifteen thousand tons in the other case.

Q. Now, the fifteen thousand ton contract; what is the discount in it?

Mr. Hall: Now, just a moment, please.

I think it has been developed in the record that this company has contracts with what is called the G. L. F. and the Allied Mills. If those are the contracts the witness is testifying about I object to the testimony on the ground that the written document is the best evidence of it. His recollection of what the contract is, is secondary evidence.

Trial Examiner Diggs: I am going to overrule that objection for this reason. Of course, I appreciate the contract speaks for itself but this may be an attempt, now, to show that the contract was not actually lived up to and that there was some other arrangement and some other discount other than the contract arrangement and discount. If that is the purpose I will allow the question.

264 However, if you are simply trying to show the contract terms and arrangements I will sustain the objection on the ground that the contract, itself, is the best evidence.

Mr. DeBirny: Now, Mr. Examiner, I am not trying to show the contents of the contracts at all. I am asking the witness whether the greater discount was granted for the greater volume, or whether the smaller discount was granted for the greater volume, and the greater discount granted for the larger volume.

Trial Examiner Diggs: Then, the objection is overruled and you may have an exception.

By Mr. DeBirny:

Q. Will you answer that question?

The Witness: What is the question, please?

Trial Examiner Diggs: Read the question.

(The reporter read the question as follows:



"Q. Now, the fifteen thousand ton contract; what is the discount in it?")

The Witness: Fifty cents per ton.

By Mr. DeBirny:

Q. And what is the discount on the sixty thousand ton contract?

Mr. Hall: Thirty thousand tons.

By Mr. DeBirny:

Q. What is the discount in the thirty thousand ton contract?

265 A. Sixty-five cents.

Q. At what points are these buyers located?

A. The thirty thousand ton contract buyer is located at Buffalo, New York. The other one is at Chicago, Illinois.

Q. At Chicago, Illinois?

A. Yes.

Q. Do you know whether or not these buyers sell generally over a wide area?

A. The one in Chicago sells over a very wide area. The one at Buffalo, New York, sells principally in New York State, New Jersey, and Pennsylvania.

Q. Do you know whether or not at any point those buyers are competing in the sale of the goods?

A. Yes, they are competitors, generally, I believe.

Q. Now, Mr. Kayhart, do you have any other customers who purchase in quantities as great as either of these customers purchase?

A. As near as I can remember there is no other customer that buys as much as fifteen thousand tons. I am pretty certain of that.

Q. With regard to deliveries do you deliver at one central point or any number of points for these customers?

A. I deliver at several points for each of them.

Q. When you say "several points" how many points does the customer at Chicago require delivery at?

266 A. Four points.

Q. Can you name them?

A. More than four. Four to six, possibly seven.

Q. Can you name those points?

A. Peoria, Illinois; Omaha, Nebraska; Buffalo, New York; Fort Wayne, Indiana; Alliance, Ohio; Portsmouth, New Hampshire; Portsmouth, Virginia. That is all.

Q. In selling to those customers do you consign the goods?

A. No.

Q. Do you consign goods in selling to any of the customers—any of your customers?

A. No.

Q. Now, with regard to your customer in Buffalo, New York, to how many points do you ship?

A. There are two mills, one at Buffalo, New York, and one at Albany, New York.

In addition to that, we ship to a great many, so-called "retail stores" throughout the territory; how many I could not even try to guess or say.

Q. Retail stores to whom the customer sells?

A. No. We ship to retail stores which they operate, themselves.

Q. Retail stores which they, themselves, operate?

A. Yes.

Q. In those shipments to the retail stores what is 267 the average size of the orders; if you know?

A. The minimum is twenty tons; and, the maximum may be up to whatever the car will hold, about thirty-five tons.

Q. Who pays the freight on those shipments?

A. We pay the freight, which is included in the price.

Q. When you ship for this customer to a retail store taking less than a carload, do you charge the carload price or less than the carload price?

A. We do not ship less than the carloads—we do not ship less than a carload to them.

Q. I understood you to say that you shipped from twenty tons up to a carload?

A. No. Twenty tons, which is a minimum carload, up to whatever the car will hold.

Q. In addition to those two customers which you have referred to, do you grant any discounts to any groups of buyers?

A. Groups?

Q. Yes.

A. Do you mean by that, an Association—

Q. Well, any groups.

Mr. Hall: Just say you do not know what a "group" means, if you do not know.

By Mr. DeBirny:

A. A group, or association, or aggregation of individuals which—whether they are incorporated or not, 268 I am not distinguishing.

A. No.

Q. No?

A. No.

Q. Do you give any discounts to any buying offices—

A. No.

Q. —to which these parties belong?

A. No.

Q. Do any groups of individuals, or individuals buying collectively, buy in excess of fifteen thousand tons in a year?

A. No.

Q. No?

A. No, they do not.

Q. When you receive payment from the buyer—from the two buyers that you have referred to, do you receive payments for the individual shipments or for the total purchases over a period of time?

A. Each shipment is paid for, individually.

Q. Does the retail store pay for the shipment or whom do you bill?

A. It is billed to the general office at Buffalo.

269 Q. Do you know why the milling in transit is not utilized on feed by Corn Products Refining Company?

A. I don't know.

Q. Do you know whether your competitors, whose names you have mentioned, use milling in transit on their sale of feeds?

A. I don't know.

Q. Aside from these two customers, are there any other customers who receive any discounts or allowances in connection with their purchases?

A. Yes, there are.

Q. What do they receive?

A. Fifty cents.

Q. What do they receive it for?

A. For a function that they perform in the trade.

Q. What function?

A. They buy our feed in full carloads and have some distribution to smaller dealers who are not big enough to buy carloads themselves.

Trial Examiner Diggs: What is that fifty cents, fifty cents based on what?

Mr. Hall: Fifty cents a ton.

Mr. DeBirny: Fifty cents a ton.

By Mr. DeBirny:

Q. Will you amplify that answer some, I don't know what you mean to convey?

270

A. They are dealers who sell to smaller dealers who are not big enough to buy full carloads themselves, you see.

Q. Well, don't all of your dealers sell to other dealers?

A. No.

Q. Many of whom are unable to buy a full carload?

A. No. Most of the dealers are retail-dealers who sell to the consumer.

Q. Who is this purchaser that you have just mentioned who gets this fifty cents?

A. Marshfield Milling Company, Marshfield, Wisconsin.

Q. Are they the only one?

A. No, there are three others.

Q. Give us their names, please?

A. E. W. Bailey & Company, Montpelier, Vermont, J. C. Stewart & Company, Pittsburgh, Pennsylvania, and Farley Feed Company, Wisconsin. They are in Wisconsin, I can't recall the address.

Q. Are there any other customers who receive any such allowances?

A. Not to my knowledge, none other that I know of.

Q. In connection with this so-called fifty cents a ton allowance to Bailey in Vermont, is that fifty cents a ton deducted from the face of the invoice in making the price, or how does it enter the transaction?

271 A. That is deducted from the face of the invoice.

Q. Is that contract pursuant to—or is that arrangement pursuant to any contract?

A. No.

Q. Are any of the other arrangements pursuant to any contracts?

A. Not of the four that I have just mentioned.

Trial Examiner Diggs: I suppose by the term "contract" you mean something written?

Mr. DeBirny: Some written instrument or memorandum.

The Witness: No.

By Mr. DeBirny:

Q. You say you sell to Bailey, where is he, St. Albans, or Burlington?

A. Montpelier.

Q. Montpelier. You deduct fifty cents on the invoice, or do you simply invoice it at fifty cents less than the regular price?

Mr. Hall: Why don't you ask the witness if he knows, you are going into the accounting department.

The Witness: I am not sure just how it is done.

By Mr. DeBirny:

Q. Do you have anything to do with making up those invoices?

A. No, I have nothing to do with making up the invoices.

Q. Are any rebates granted on any of the sales of feed?

272 A. No.

Q. No advertising allowances?

A. No.

Q. In referring to those last four mentioned customers, to how many points do you ship?

A. To Bailey we ship to several points in Vermont and perhaps one or two of the other New England States.

To the other three we ship only to their local destinations.

Q. Now, to Bailey at Montpelier, Vermont, to what points in Vermont do you ship?

A. Well, I can't—I don't believe I can recall all of them. We ship to Montpelier, St. Albans, Swanton—I don't recall—

Q. To Rutland?

A. Possibly, I am not sure.

Q. Burlington?

A. I am not certain.

Q. In sales to this customer, do you make shipments directly or to customers of Bailey?

A. We do not, no. It is shipped in Bailey's name. It is shipped to Bailey.

Q. Do you sell to any other customers in Vermont?

A. Yes, sir, several. We have a number of customers in Vermont.

273 Q. Where are those customers located?

A. Throughout the state.

Q. Can you name those customers?

A. I can probably name a few of them.

Q. Will you do so?

A. St. Albans Grain Company, at St. Albans, Vermont, Crosby Milling Company, Brattleboro, Vermont, and we have several others, but I cannot recall them. The names do not come to me right now.

274 Q. Does the New England Grain Company sell feeds?



A. That is their business, yes.

Q. They are a wholly owned subsidiary of your corporation?

A. I don't know. I really don't know anything about that.

Q. Do you know whether they are a subsidiary of your corporation?

A. I have heard that there is a connection, but to what extent, I don't know.

Q. Do you make sales to them?

Mr. Hall: I will admit that they are, if you want us to.

Mr. DeBirny: I thought the witness would say.

Mr. Hall: I don't think he knows about that.

Mr. DeBirny: All right.

By Mr. DeBirny:

Q. Do you make sales to the New England Grain Company?

A. Not as New England Grain Company; no.

Q. What do you make them to?

A. To individual mills, of which St. Albans Grain Company is one, and Crosby Milling Company is one.

We don't make any sales to New England Grain Company.

Q. In your sales to these other customers in Vermont, other than to Bailey, is the volume greater or less to those customers than to Bailey?

275 A. Bailey is the largest distributor in that State.

Q. Do you sell to any company in Vermont that is not a member of the New England Grain Company, or controlled by the New England Grain Company?

A. Well, I cannot say as to who they control.

We do sell to numerous other individuals, whether the New England Grain Company has an interest in them I don't know.

Q. Now, all of those shipments are made from Argo, are they?

A. From Argo or Pekin, principally Argo.

Q. Do you maintain any stocks of feed anywhere in the country?

A. Yes, we have surpluses of feed stored.

Q. Other than at your manufacturing plants?

A. Yes.

Q. Where are such depots located?

A. In public warehouses.

Q. Where?

A. At Hammond, Indiana; Cleveland, Ohio; Clearing, Illinois; Swanton, Vermont.

Q. Now, do you sell any appreciable quantity of feed in less than earload lots?

A. Very little. Probably less than one per cent. of our business.

Q. Where you have these stocks, were all of these stocks accumulated from production at Argo, or where?

276 A. Argo and Pekin.

Q. Will you tell us what kind of feeds are referred to in this discussion?

A. Gluten-feed and gluten meal.

Q. Are there different grades of gluten feed and gluten meal?

A. Yes.

Q. Manufactured by your company?

A. Yes, we have two grades of gluten feed.

Q. What are they?

A. One is the regular gluten feed and the other is gluten meal—gluten feed with an admixture of molasses, sweetened.

Q. In gluten meal are there different grades?

A. Gluten meal is a higher grade product than either of the others.

Q. What is the—what are the physical characteristics of gluten feed and gluten meal; how do they appear and look; what are they?

A. They are both granular products.

Q. Do they look like bran?

A. Not as coarse.

Q. Or more like flour?

A. Not as coarse and flaky in texture as bran, and more granular than flour.

Q. Is it all sold in sacks?

A. Partly in sacks.

277 Q. What other way?

A. Bulk.

Q. What do you mean by "bulk?"

A. Loose in the car, not in packages.

Q. What keeps it from getting out of the car when it is loose?

A. Sometimes it does get out, but if the car is tight it stays in.

Q. Are those sort of like coal cars that you ship in?

A. No, they are regular—

Trial Examiner Diggs (interposing): I do not think we need to go into that.

The Witness: They are like automobile and box cars.

By Mr. DeBirny:

Q. Do you give any discounts for car load or less than car load shipments, or do the prices differ?

A. The price is the same, except for the additional freight that has to be paid on less than car loads.

Q. Is the price the same whether you buy a car load of sacks or a car load of the loose product?

A. No, if you buy in sacks the cost of the sacks is included in the price.

Q. In the figures which you have prepared as to the price of meal, did that refer to loose?

278 A. That referred to bulk product.

Q. Not in sacks?

A. It does not include sacks.

Q. How much is added for the packages today?

A. It varies. Today it is one dollar and sixty cents a ton for new bags and a dollar twenty cents a ton for second-hand bags.

Q. How long has that price been effective—how long has it been in effect?

A. Several months, I cannot say.

Q. Does it fluctuate frequently?

A. Yes, it fluctuates on the value of bags and burlap.

Q. With reference to the other three customers,—we have discussed Bailey in Vermont, who were the others?

A. Marshfield Milling Company.

Q. Where are they located?

A. Marshfield, Wisconsin.

Q. To what points do you ship to that customer?

A. Just to Marshfield.

Q. Do you have any other customers at Marshfield?

A. I think not.. I don't know.

Q. With reference to those other two that you mentioned what were the names?

A. Farley Feed Company, I don't recall where they are located.

279 Q. You said in Wisconsin.

A. Yes, sir; somewhere in Wisconsin.

Q. Do you know whether they are at Green Bay?

A. I really don't know, if you would mention the name.

Q. The fourth?

A. J. C. Stewart Company, Pittsburgh, Pennsylvania.

Q. Do you sell to other customers in Wisconsin, other than Farley Feed Company and Marshfield Milling Company?

280 A. Yes.

Q. And you ship to all those customers from where?

A. Argo and Pekin.

Q. With regards to your customer at Pittsburgh—do you have other customers at Pittsburgh?

A. Yes, I know we have one other customer there.

Q. Do you know whether those customers are competitively engaged?

A. I don't know.

Q. Do you know why one customer was granted the allowance and not the other?

A. The reason I gave before. One customer makes sales to other retailers, to small—to other retailers too small to buy carloads themselves.

Q. Do you know whether the other customer at Pittsburgh does likewise?

A. I don't know.

Q. Did you ever make any attempt to find out?

A. No.

Q. Did you ever offer to give them the allowance of fifty cents if they would do that?

A. I never discussed it with them.

Q. Was this fifty cents allowance a secret allowance, only granted to those four customers and only known to them?

A. I don't know whether anyone knows about it or  
281 not. I doubt it.

Q. You doubt if any of your customers know about it?

A. I doubt it.

Trial Examiner Diggs: Did you ever give any such discount to this other customer in Pittsburgh?

The Witness: No, sir.

By Mr. DeBirny:

Q. For how many years have you been granting these discounts or allowances?

A. I would not want to undertake to answer that, because I really don't know.

Q. Has it been many years?

Trial Examiner Diggs: I don't think you need go back of 1936, should we?

Mr. Hall: I don't know of any reason why we should, but I haven't any idea what Mr. DeBirny has in his mind.

282 Mr. DeBirny: I will reframe the question.

By Mr. DeBirny:

Q. Did you commence to sell any of these customers since June 19, 1936, at these prices?

A. I think so.

Q. Which ones?

A. The—all of them, I believe.

Q. All of them?

A. All of those that I have mentioned.

Q. All right. Now, how long ago did you commence this practice; a year, or a year and a half, or six months ago?

A. It wasn't commenced with each one at the same time. I don't have those dates in mind.

Q. Do you know who sold to these customers prior to the time you granted these allowances?

A. We did. That is all I know.

Q. Do you know whether anyone else sold to them?

A. I don't know.

Q. Who has the records of the prices at which these customers were sold, these customers that obtained the fifty, sixty, and sixty-five cents, and so forth, a ton?

A. Well, the records are in the office.

Q. Are they in your custody?

A. In our department, yes.

Q. Do you have the records of shipments as well as of prices?

283 A. Yes.

Q. Do you know in what territory your customers at Pittsburgh distribute?

A. Within a small area, in a small radius, I presume.

Q. Are those shipments made from Argo to that customer?

A. Yes.

Q. To how many points do you ship to that customer?

A. Simply to Pittsburgh.

Q. Mr. Kayhart, when you—when those special allowances were granted to these companies, with whom were those prices discussed by you?

A. With members of the buying department.



Q. Do you have the privilege of making any price you want to your customers?

A. No.

Q. Well, whose approval do you have to obtain?

A. Some of the executives.

Q. Who are they?

A. I don't remember which ones it happened to be in any of these cases.

Q. Did you talk with Mr. Buhrer about them?

A. I didn't personally. Personally, I didn't make the arrangements.

Q. Who made the arrangements?

A. My superior in the department.

284 Q. What is the name?

A. R. P. Walden.

Q. Do you know whether or not Mr. Walden has made any special arrangements with anyone other than these people?

A. These are the only ones that I know about.

Q. Would you know about any other arrangements, if they did exist?

A. I feel sure that I would.

Q. Are you the secretary of the merchandising committee?

A. Yes.

Q. Do you maintain minutes of the meetings of that committee?

A. Yes.

Q. Were these matters discussed with the merchandising committee?

A. I think not. No, they were not discussed with the merchandising committee.

Q. Are any references about that contained in any of the minutes of the merchandising committee?

A. No.

Q. Did Mr. Walden conduct all of the negotiations with reference to these special arrangements?

A. Yes.

Q. Do you know whether these special prices were to continue for any definite time?

A. I don't think there was any definite time put on any of them.

285 Q. Do you maintain any sales agents for feed throughout the country?

A. We have what is known as brokers.

Q. Do you sell all of your feed through brokers?

A. No, we have our own branch offices through which most all our feed is sold.

Q. Do you know whether any brokerage is paid to anyone affiliated in any way with any of your buyers?

A. No.

Q. Do you mean that you don't know, or is the answer that you do not?

A. The answer is that I know we do not pay any brokerage to buyers.

Q. What was your annual production of feed last year?

A. Approximately 250,000 tons.

Q. 250,000 tons?

A. Yes.

Mr. McCollester: By "last year" you mean 1937?

Mr. DeBirny: Yes.

The Witness: 1937.

By Mr. DeBirny:

Q. Will it exceed it this year?

A. I think it will.

Q. Did you have any of these four contracts we were talking about last year?

286 A. Yes, all of them.

Q. Did you have all of them in 1936, at any time?

A. I am not certain about that.

Q. Do you know the approximate volume of purchases of each one or any of these four buyers?

A. I think I can make a fair estimate of Bailey's. That is between 900 and 1200 tons, a year. The others I don't handle personally.

Q. Are they less?

A. They are less, much less.

Q. Do all distributors of feed quote practically the same price to any given point?

Mr. Hall: Are you speaking of corn gluten feed, or all feeds?

By Mr. DeBirny:

Q. Of your kind of feed?

A. Pretty generally, I think so.

Q. Do you generally receive the prices of feed as the company receives the prices of glucose daily as to what your competitors sell at?

A. No.

Q. Did you receive it at all?

A. We receive our competitors' quotation in this way: That our representatives pick them up and send them in to us.

Q. Do you know why there is not a daily reception 287 of such information?

A. No. I do not know why there is not a daily reception of such information.

Q. Has there at any time been any regional differentiation or deviation in prices; that is, for a particular time a reduction in price for a particular area other than the price being charged, the regular and customary net price at that time?

A. Yes.

Q. State the details of an example?

A. In Kansas City, for instance, you may have a surplus of feed there for that area that Kansas City supplies. We would make a lower or higher price if feed is over or short there.

Q. To all purchasers who receive from Kansas City feed they would obtain the same price, would they?

A. Same price.

Q. And to that extent the Chicago and the Kansas City price do differ?

A. Yes.

Q. Are there any other factors that enter into the price structure which cause deviations?

A. That is the only one.

Q. Are special prices ever made by you for competitive reasons?

288 A. No. We make no special prices.

Q. Have you sold, at any time, since June 19, 1936 to any other customers than those that you have mentioned at a base net price?

A. No.

Q. How many feed customers does Corn Products Refining Company have, approximately?

A. More than a thousand.

Q. Several thousand?

A. I would say not more than three thousand.

Q. Mr. Kayhart, I find it not clear in the record, I believe, just what this fifty cents a ton is paid for, according to your view.

I understand that you grant it to people who resell goods to others?

A. In those cases that is my understanding of why it was granted because of the performance of the function in the business.

Q. Just what do they do?

A. They sell feed to other dealers who are not large enough, or do not have sufficient volume of business to buy carloads, themselves.

Q. Well, do these same four customers I am now referring, do they also sell to customers, to farmers as others do it?

A. I believe they do sell to farmers and ultimate consumers.

289 Q. Do you know what proportion of their business that represents?

A. No.

Q. Did you make any effort to find out?

A. We know what proportion of our feed they sell.

Q. That is what I mean. I am referring to the feed that you sell?

A. We know what proportion of our feed they are selling.

Q. That is what I meant.

A. We know that by their statement. They render a statement of that kind.

Q. Do you solely use that fifty cents allowance on that?

A. I am sorry. I do not know what you mean.

Q. Do you solely allow them the fifty cents a ton on the price of the tonnage that they resell?

A. That is right.

Q. You do not allow that fifty cents a ton on the portion they resell to farmers?

A. No, except Bailey. Bailey gets fifty cents on all of his tonnage. That is deducted from the invoice. He gets that on all of the feed he buys. The others get on a statement which they render to us at the end of the month showing how much they have sold to other dealers.

Q. And on that portion which they have sold to other dealers they get fifty cents a ton off?

290 A. Yes, that is right.

Q. But on the portion they resell to farmers they get nothing?

A. Right.

Q. Do you purchase anything from any of the people who buy from you feed?

A. I think not. Of course I do not know. The purchasing department would handle all the purchases. We do not do any purchasing in our department.

Q. Then you have no knowledge of any such transaction?

A. I cannot imagine anything that we would buy from any of them.

Q. What interest is it to you as to the prices at which your competitors sell? You said a minute ago that your brokers send in lists of prices to you that your competitors sell at?

A. It is all interesting to us to the extent that if we have a higher price we probably could not sell our feed in competition.

Q. But do you make any effort to use your prices for competitive purposes in a flexible way and adjust your prices because of that information, up or down?

A. Yes. We do use that information in order to adjust our prices to meet the situation as we see fit or necessary.

Q. Well, now, the reason I asked you that question 291 was, I have seen here yesterday and I understand that will be introduced as exhibits when they can be checked certain lists which your company sent to Washington as to the prices which it charges for feed it has sold and which gives prices at which feed is sold to customers. Those lists would show on them that the list was made out in May and that was the price which would take effect in June and July. I want to know what that means. In other words, a list that is made out in May would show the prices for the delivery of your merchandise in June or July. I would like to understand just what is behind that?

A. That means that sometime in May we quoted a price for June, June or July feed.

Q. Now, how far in advance may your feed be purchased?

A. Today, the buyers may purchase it for December or January shipment.

Q. In other words, at this time a buyer could purchase for December or January shipment?

A. That is correct.

292 Q. Do you make any exceptions to those terms?

A. No.

Q. That is, there is a sixty day period during which they can expect delivery; is that what you mean to convey?

A. Well.



Q. Or will you explain?

A. Our sales are made on the monthly periods. For instance, yesterday we decided to sell feed for January shipment as well as December but we have been selling December for thirty days, I presume.

Q. Well, now, when you decide to sell for January and December shipment or February shipment, do the buyers who have bought prior to that time have the opportunity to buy under the former and lower price such as they do in the glucose purchases from your company?

A. No. When we make a price it is effective—

Q. Immediately?

A. —Immediately. The possible exception is that one of our branch offices may have already taken some business at that time and submitted it to us. That is the only exception.

Q. Are any of your buyers ever advised prior to the time the price change is being made that it is going to be changed?

A. No.

Q. You mean by that that none of your buyers is ever  
293 advised prior to the price change being made that it is going to be made and what it is?

A. No.

Q. Once you make a price change from that and immediately on thereafter all orders are at the new price?

A. At that price; that is right.

Q. Why did you not give them an opportunity in feed, as in glucose, to purchase at the lower price?

A. If we decide feed is worth more money, we want to get that money for it.

Q. What is that?

A. Once we decide to get a little more money for it, we stick to that. When we decide that feed has a greater value, we want to realize that greater value from it.

Q. When you decide glucose has a greater value, why don't you get that?

A. I do not know anything about that.

Q. Does anyone correlate the pricing practices of the Corn Products Refining Company when it comes to feed and to glucose?

A. No.

Q. Don't you all come under Mr. Buhrer?

A. I never have anything—I am never consulted and never asked for any information or opinion or advice in

connection with glucose. What I do is solely connected with the selling of feed.

294. Your sales division does come under the general sales manager, Mr. Buhner?

A. Yes. Mr. Buhner is the general sales manager.

Q. Well, now, you said yesterday you did manage to sell, for, or rather to quote to interested buyers, a price at which you would accept orders for January deliveries?

A. Yes.

Q. And February deliveries?

A. No.

Q. Just January?

A. Just January.

Q. Now, when would you decide to accept orders for February deliveries?

A. Well, I do not know in advance approximately thirty days from now I should say, however.

Q. Is that the customary practice about every thirty days, and some indefinite time to do that?

A. Yes.

Q. Why don't you have a regular date?

A. Why, I do not know. There is no reason that I know of.

Q. And prior to day before yesterday for purchases for January delivery, you were not accepting any orders?

A. Oh, no, but not at any price. He could have placed a tentative order to take the price when it is made.

Q. But once that order is given for January delivery, do you bind buyers, if the price goes down, refusing to accept at the higher price?

A. Some.

A. Some?

A. Some of them.

Q. Do you have certain customers that always do?

A. There are a certain few that try to welch on their contracts, but not many.

Q. What do you do about that?

A. Well, we do the best we can to make them take it. If they absolutely refuse, why, we have to forget about it.

Q. Who are those customers?

A. Why, I could not mention any offhand.

Q. Don't you have any in mind?

A. I probably could mention one or two.

Q. Well, who are they?

Mr. Hall: May I ask what is the purpose of this line of testimony? You want to establish that we have habitually given somebody a special price?

Mr. DeBirny: I want to find out what the facts are.

Mr. Hall: Or that some customer of ours that we have a little difficulty in handling and we have to bargain and compromise with him rather than lose his good will?

Trial Examiner Diggs: I think if you had put it in 296 the form of an objection, I think the objection is good unless counsel for the Commission has in mind an attempt to show that by this means somebody gets a preferential price.

Mr. DeBirny: That is it, exactly.

Trial Examiner Diggs: In that case, in view of what has been said, I think the question would be competent.

Mr. DeBirny: That is exactly what I want to say.

Trial Examiner Diggs: I think now if that is the purpose, I will overrule the objection.

297 By Mr. DeBirny:

Q. Mr. Kayhart, if a customer comes in today and places an order with your company for January delivery at the announced January price and asks for delivery, we will say, on the twenty-fifth day of January, and on the fifteenth of January, we will assume the price is reduced ten cents or any sum you wish, what price does that buyer pay for the goods?

A. That buyer pays the contract price provided the price is not lower than in the contract on the date of shipment.

Q. If the price is lower than the contract on the date of shipment what happens?

A. He gets the benefit of any lower price on the date of shipment.

Q. Well, then, what did you mean a while ago when you said you did have in mind one or two customers who welched on their contract?

A. They buy more than they can use and they just lie down on it and do not want to take it. It is not a question of price.

Q. Why do they buy more than they can use?

A. Well, I do not know.

Mr. Hall: I think you will have to ask them that question.

The Witness: Their business did not come up to expectations, I suppose; I really do not know.

298 By Mr. DeBirny:

Q. There are no advantages to quantity buying, as I understand it?

A. They are usually very small buyers.

Mr. DeBirny: I believe I have no further questions at this time.

Trial Examiner Diggs: You may cross examine.

Mr. McCollester: I will defer cross examination if counsel consents.

Mr. DeBirny: With the understanding that we can ask the witness more questions on direct examination.

Trial Examiner Diggs: Is that agreeable to you?

Mr. McCollester: That is correct.

Mr. DeBirny: Yes, with that understanding.

Trial Examiner Diggs: In that case, the witness may be excused subject to that limitation.

(Witness excused.)

Mr. McCollester: Mr. Examiner, may I say this on the record, I have not repeated my objections as counsel has asked the questions about discounts, and so forth, on the understanding that the objections made yesterday to that line of questions goes to any questions about matters outside of the basing points and that it carries through all of this examination.

Trial Examiner Diggs: It may be understood in this 299 particular case and you may have exception to all of my rulings that were adverse to you.

Mr. DeBirny: I understand that it is solely to any questions that had no connections with the basic point?

Mr. McCollester: That were designed to bring out matters of secret contracts and so forth; I do not want to repeat the objection because I understand the objection will be carried through.

Trial Examiner Diggs: That is correct.

502 Monday, March 27, 1939 at 10 a. m.

E. W. SCHMITT was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

*Direct Examination by Mr. DeBirny.*

Q: Will you state your name?

A: E. W. Schmitt.

Q. Mr. Schmitt, what position do you occupy with the Corn Products Sales Company?

A. Divisional Sales Manager.

Q. What division do you manage?

A. It is division of the sales department, it handles confectioners' syrup in the several industries.

Q. Do you occupy any position with the Corn Products Refining Company?

A. With the Refining Company, no, sir. With the Sales Company.

Q. As manager of the confectionery division of the 503 Corn Products Sales Company, what are your duties?

A. Primarily organization of our own sales staff, correlate the function of the field force, technical service force, and the promotion of sales of goods.

Q. What function does the technical service force perform?

A. Assists the industry in problems in which we feel that assistance will be beneficial to us ultimately in the sale of merchandise.

Mr. Hoopingarner: I do not quite hear you, Mr. Schmitt. Will the witness kindly speak louder, Mr. Examiner?

Mr. Hall: Let the stenographer read the answer.

(The answer referred to was read by the Reporter.)

By Mr. DeBirny:

Q. What form does this assistance take?

A. Personal service. We have technical men who are thoroughly familiar with our products and more or less specialists in the industries they service.

Q. You mean that they are specialists in candy manufacturing?

A. That is right.

Q. Are you a specialist in—

A. No—

Q. —candy manufacturing?

A. —I am not.

504 Q. Who heads up this technical service force?

A. Mr. H. T. Middleton.

Q. Who?

A. H. T. Middleton.

Q. H. T. Middleton?

A. Middleton.

Q. Is he located in New York City?

A. No, he is not. He is in Edgewater.



Q. Is he in this vicinity at the present time, do you know?

A. I believe so.

Q. Now, in addition to the technical service rendered to the candy manufacturers, is there an advertising service which you have?

A. We have offered sometimes through the medium of a house organ to offer suggestions for label structure and so on and so forth.

Q. In addition to this construction of labels do you engage in cooperative advertising?

A. No, we have nothing to do with any cooperative advertising.

Q. What term do you apply to the advertising which has been carried out in conjunction with the Curtis Candy Company if you do not call it cooperative advertising?

A. Well, I would call that cooperative advertising; but I am not familiar with that proposition at all.

Q. Do you mean by the statement that you are not 505 familiar with that at all?

A. I have no acquaintance with the Curtis Candy Company advertising proposition. I subsequently read about it in the newspapers.

Q. Is that the only knowledge you had of it?

A. That is the only knowledge I had of it.

Q. Now, do you have any knowledge of any other and similar advertising arrangements?

A. I do not.

Q. Have you ever heard of the Bachman Candy Company?

A. Yes, sir.

Q. How do you spell that?

A. B-a-c-h-m-a-n. It is not the Bachman Candy Company, it is the Bachman Chocolate Company.

Q. Do you sell them your products?

A. Yes, sir.

Q. Do you know Mr. Bachman?

A. Oh, yes. I know Mr. Bachman very well.

Q. You say you know him very well and yet you never heard of the arrangements which your company had with the Bachman Chocolate Company for advertising?

A. I heard of it. I have no direct knowledge of it.

Q. You have no knowledge of how much money was spent?

A. I have no knowledge of how much money was spent. I do not know how much money was involved.

506 Q. What other companies have you heard about with regard to cooperative advertising or advertising of a similar nature to that with Curtis Candy Company and with Bachman Chocolate Company?

Mr. McCollester: I object to that as being a general question, outside of the amended complaint. The amended complaint specifies certain particular advertising; alleges certain alleged advertising contracts and I think this is entirely too general a question to be proper. Furthermore, this witness has not shown any information within his knowledge that would permit him to properly answer the question.

507 Trial Examiner Diggs: I overrule the objection, and note an exception to counsel for the respondents.

Mr. McCollester: May I renew the objection and point out that Count 2 of the amended complaint, in paragraph 2, specifically alleges as follows:

"Respondents have entered into advertising arrangements with certain of their purchasers, to-wit:

Curtis Candy Company of Chicago, Illinois, and Bachman Chocolate Manufacturing Company of Mount Joy."

Those are the only ones specified and it is "to-wit"; I think their complaint is limited to that. It is not just given as an example, it is after the words, "to-wit." That specifically limits it, in my opinion, to this complaint here, and I do not believe they can go beyond that. It seems to me it would be quite improper for them to do so.

Mr. Hall: Yes, I do not think that they can go beyond that, Mr. Examiner.

Trial Examiner Diggs: Well, I think it would be well to look at the complaint and see what it has to say in that regard.

Mr. McCollester: I think Mr. DeBirny has a copy of the complaint there.

Mr. DeBirny: Yes, I will be glad to show it to you.

Mr. McCollester: I urge this second objection, 508 if the Examiner please.

509 Trial Examiner Diggs: I overrule the second objection, and give an exception to the respondents.

By Mr. DeBirny:

Q. Will you please answer the question?

A. I am sorry. I have forgotten just what the question is.

Mr. DeBirny: May the question be read?

Trial Examiner Diggs: Yes. The reporter will read the question.

(The Reporter read the question as follows:

"Q. What other companies have you heard about with regard to cooperative advertising or advertising of a similar nature to that with Curtis Candy Company and with Bachman Chocolate Company?")

A. I do not know the terms of any of these arrangements so what I think is only hearsay knowledge.

Q. Whom did you hear it from?

A. General discussion on the street.

Q. Did you hear any discussion around the office about it?

A. Not of a nature that would give me any knowledge of it.

Q. Do you yourself have no—

A. Have no connection.

Q. —have no personal conversation with Mr. Bachman or with Virginia Dare outfit or with Curtis about this—about these allowances?

510 A. Not regarding advertising. I do not touch advertising at all.

Q. With regard to the house organs that you mentioned, what are the names of those organs?

A. "Dextrose Digest" is the only one we publish.

Q. How long have you been with the company?

A. Twenty-seven years.

Q. And how long have you occupied your present position?

A. About three and one-half to four years.

Q. What position did you occupy before that?

A. Oh, rather worked as an assistant to Mr. Fred Mueller.

Q. Prior to the adoption of the Dextrose Digest as the house organ presently publishes—

A. That is right.

Q. —the house organ relating to confectionery was called the "Candy Kettle"—

A. That is right.

Q. —was it not?

A. Yes.

Mr. DeBirny: I would like to at this time have this copy of the Candy Kettle marked for identification.

Trial Examiner Diggs: That may be marked.

(The document referred to was marked "Commission's Exhibit 60" for identification.)

Trial Examiner Diggs: I suppose this organ you are talking about is a publication of some kind?

The Witness: That is right. The gentleman on the end has a copy of it.

Mr. DeBirny: Would you care to look at it?

Mr. Hall: Yes, thank you.

Mr. DeBirny: On the inside is the portion marked, which I am interested in.

Mr. Hall: Are you waiting for this, Mr. DeBirny?

Mr. DeBirny: Yes.

Mr. Hall: Pardon me, I did not know.

By Mr. DeBirny:

Q. Mr. Schmitt, I hand you Commission's Exhibit 60 for identification, and ask you what that is?

A. Copy of the Candy Kettle.

Mr. DeBirny: At this time we offer that as Commission's Exhibit.

Mr. McCollester: Will you state the date?

Mr. DeBirny: It is a copy of the Candy Kettle—

The Witness: February of 1936. Is that what you want?

Mr. DeBirny: Yes.

Mr. McCollester: I object to it. It is prior to the Robinson-Patman Act, Mr. Trial Examiner.

512 Trial Examiner Diggs: I am going to sustain the objection for this reason: Counsel for the Commission has stated that in this exhibit issued by the respondent there is a statement to the effect that they will not pay the cost of the advertising of their customers and it is his contention that this paper is admissible because in future publications after the date of the Robinson-Patman Act there is no reference to the same matter—that is, the matter of non-payment, and, therefore, by inference it may be presumed it continues.

I do not think it is relevant. You cannot bind the respondent to some act which he did prior to the passage of the Robinson-Patman Act.

Mr. DeBirny: Well,—

Trial Examiner Diggs: And counsel for the Commission may have an exception.

Mr. DeBirny: We would like an exception. But—

Trial Examiner Diggs: Now off the record, Mr. Reporter.

Mr. DeBirny: Over and above that—

Trial Examiner Diggs: Off the record.

Mr. DeBirny: —we offer this for the purpose of showing that the respondent is making this service available to increase the candy makers' volume.

Trial Examiner Diggs: Let that go in the record, just where he started in there and then take this from me:  
513 It is my view that does not add any force to the contention, Counsel. It is all subject to the same criticism which I have just made and the ruling stands.

Mr. DeBirny: I would like an exception to that ruling also.

Trial Examiner Diggs: You may have an exception, Counsel.

By Mr. DeBirny:

Q. Mr. Schmitt, what connection have you had with the publication of the Candy Kettle?

A. No direct connection other than sort of edit the articles that go in there in regard to the confectionery industry.

Q. Does the material that goes in the Candy Kettle or the present Dextrose Digest relate to other than the candy industry?

A. Yes. Dextrose Digest was built-up so that other industries using Dextrose might have some space and representation in it.

Q. And what about the Candy Kettle?

A. The Candy Kettle is superseded by the Dextrose Digest.

Q. But the Candy Kettle was the only—was only devoted to interests of the candy manufacturers?

A. Primarily.

Q. When a salesman interviews one of your customers does he offer that customer this advertising service?

Mr. Hall: Wait a minute—

514 The Witness: As a—

Mr. McCollester: How could he know?

Mr. Hall: How does Mr. Schmitt know what the salesman says?

Trial Examiner Diggs: I think it should be confined to what he knows, and if he knows of his own personal knowledge, all right.



By Mr. DeBirny:

Q. Do you know whether the salesman—

—Mr. DeBirny: I withdraw the previous question then.

By Mr. DeBirny:

Q. Do you know whether or not the salesman have instructions to acquaint the purchasers of your products with the service that you render to them of an advertising nature?

A. Under the heading of general instructions the salesmen—and every prospective customer we hope gets a copy of this book the salesman has, to use his own initiative in so far as making the benefit of service of that kind.

Q. If—

A. I—

Q. —a customer should ask the salesman for any advertising assistance what would the salesman do, do you know?

A. Ordinarily gather as much material and information as the man has available on the spot and submit it to his headquarters.

515 Q. And where is the headquarters located?

A. In New York.

Q. And to whom would they come?

A. That would come to me if from a confectionery outfit.

Q. Have you had any requests for assistance of an advertising nature made to you by candy manufacturers?

A. Yes, we have had several of that nature and they automatically are relayed to the advertising agency.

Q. And what does the advertising agency do?

A. They have on occasion drawn up and—a model label as to coloring, set up, so on and so forth. Set up in the customary manner and we relay to the customer and from there on he takes it upon himself from that point.

Q. Do you have a scrap-book containing the labels which have been prepared by the advertisers?

A. No, not the labels which have been prepared. I have a scrap-book in which I have gathered together material here and there and everywhere which mentions Dextrose.

Q. Do you know whether or not all of that material was prepared by the advertising agency?

A. I would not know.

Q. Have you that scrap-book with you?

A. Yes, I have one here. (Witness hands booklet to Counsel.)

516 Q. Mr. Schmitt, when was this scrap-book compiled?

A. Well, that thing has been progressive, anytime I find anything, no matter where I find it, if I think it would be of some interest to carry it, I just add something to it.

Q. Do you have any other scrap-book of a similar text?

A. That is one that I have for myself. I have encouraged other people to do likewise. This is just a part of the sales stuff.

Q. Would you mind this going into evidence?

A. Well, it is my own personal book. It is the only one I have.

Mr. DeBirny: Mr. Hall, would you have any objection to this going in evidence?

Mr. Hall: Yes, I would. This is simply a bunch of advertisements, it does not show by whom they were prepared, and who was the author of them.

Mr. McCollester: It seems to me that that would be quite improper to go into the record. I shall object to it if an offer is made.

Mr. DeBirny: I wanted to inquire on the record whether you would object to it before offering it in evidence. It seems to me that it is desirable to have it in the record as an indication of what type of advertisements are prepared in this manner.

The Witness: Well, these are advertisements that 517 show the word "Dextrose" as used in various ways.

Each one of these advertisements has the word "Dextrose" in it somewhere.

Mr. DeBirny: For that reason I think it would be desirable to put it in evidence. However, if you will object to its admission on the record, I will not offer it.

Mr. Hall: You might make photostatic copies of it. This belongs to the witness, and I do not think it should be taken away from him.

Mr. DeBirny: No, I think the record is sufficiently clear for my purpose now. If I desire to put it in the record later on, I will call for it again. I will, however, ask the witness to keep it available in the event that I should want to use it.

The Witness: I have it. I will not lose it.

By Mr. DeBirny:

Q. Does the company maintain any record of these advertisements which they have prepared?

A. I do not know. That would be an advertising proposition.

Q. Mr. Schmitt, who is your immediate superior over at the Corn Products?

A. Mr. Fred Mueller.

Mr. DeBirny: I would like to have these documents marked for identification. The first one is a copy of the "Dextrose Digest" Volume 1, February-March, 1938.  
517 (The document referred to, was marked "Commission's Exhibit 61," for identification.)

Mr. DeBirny: I ask that the next document, which is a copy of the "Dextrose Digest" for June, 1938, be marked for identification.

(The document referred to, was marked "Commission's Exhibit 62," for identification.)

Mr. DeBirny: I ask that the next document, which is a copy of the "Dextrose Digest" for July-August, 1938, be marked as Commission's Exhibit Number 63 for identification.

(The document referred to, was marked "Commission's Exhibit 63," for identification.)

Mr. DeBirny: I ask that the next document, being a copy of the "Dextrose Digest" for October-November, 1938, be marked as Commission's Exhibit Number 64 for identification.

(The document referred to, was marked "Commission's Exhibit 64," for identification.)

Mr. DeBirny: I ask that the next document be marked, this is the special edition printed on gold paper and dated June 6-10, 1938, be marked as Commission's Exhibit 65 for identification.

(The document referred to, was marked "Commission's Exhibit 65," for identification.)

By Mr. DeBirny:

519 Q. Mr. Schmitt, I hand you five "Dextrose Digests" marked for identification respectively as Commission's Exhibits Number 61, 62, 63, 64, and 65; both inclusive, and ask you to state what they are and whether they were prepared by your office.

A. They are five issues of the "Dextrose Digest" that were issued by the company, yes.

Q. Did you personally edit the material in there relating to "Dextrose"?

A. I read it.

Q. What do you mean by "read it"; I asked you if you edited, personally, the material in there?

A. No. I did not edit it. I read just those things, over for corrections and general setup.

By Trial Examiner Diggs:

Q. Did you make any corrections if any were necessary?

A. Corrections when necessary.

Q. Then, you edited it?

A. Well, I mean as far as spelling and pronunciation is concerned.

Mr. Hall: You mean typographical stuff?

The Witness: Typographical, yes, I did not mean pronunciation.

By Mr. DeBirny:

Q. Who finally prepares that?

520 A. This particular publication?

Q. Yes.

A. Oh, this is an advertising feature of the house. I do not know whether the committee—I am not familiar with how that committee functions.

Q. Do you read the material that goes into this?

A. No.

Q. Well, you look it over?

A. Oh, I thought you meant did I get it up.

Q. Do you get it up? Do you write it?

A. No. I do not write it.

Q. Who does prepare it?

A. For the most part, those are contributions. We solicit contributions from the trade. You will find a lot of personal stuff in there.

By Trial Examiner Diggs:

Q. Well, after it is all said and done, and all the material goes in, your company publishes these things?

A. Yes, we just get them together and set it up.

Mr. DeBirny: I offer these in evidence at this time, if the Examiner please.

521 By Mr. DeBirny:

Q. Referring to Commission's Exhibit 62 for identification, at page 11, there are some advertisements relating to the Clover Leaf Products Company of Los Angeles, California.

A. Yes.

Q. You see that?

A. Yes.

Q. Do you know whether or not the material depicted on this page 11 was prepared by Corn Products Refining Company?

A. I do not.

Q. No?

A. No.

Q. Do you know the Clover Leaf Products Company, Mr. Schmitt?

A. I have heard the name. I am not familiar with them.

Q. You have no personal contact with them?

A. No.

Q. No?

A. No.

Q. Do you know whether or not they purchase your products?

A. I do not know that.

Q. You do not?

A. No.

Q. Would you advertise—

Mr. DeBirny: I withdraw that question.

522 By Mr. DeBirny:

Q. Does anyone else produce "Dextrose" besides Corn Products Refining Company?

A. What is that?

Q. Does anyone else produce "Dextrose", Mr. Schmitt, besides the Corn Products Refining Company?

A. Yes, sir. They do.

Q. What companies?

A. The Clinton Sugar—the Clinton Sugar and Refining Company.

Q. Anyone else?

A. And the American Maize Products Company.

Q. Do you know how long they have been producing—

A. I do not know.

Q. —The product?

A. No.

Q. Have you had any discussions with the Virginia Dare Extract Company with regard to advertising done by that company or by Corn Products Refining Company in conjunction with them?

A. I am not acquainted with the Virginia Dare Company other than knowing the name.

Q. Do you know where they are located?

A. There is one in Brooklyn.

Q. What?



523 A. There is one in Brooklyn.

Q. Do you know whether or not the one in Brooklyn is the one that you have, or that the company has expended money in connection with?

A. I do not know the Virginia Dare Company. I just know the name. I buy their products.

Q. You buy their products?

A. At home, yes, I know of it—mixers.

524 Mr. DeBirny: I offer in evidence, if the Examiner please, at this time Commission's Exhibits 61, 62, 63, 64, and 65, for identification, being the copies of the "Dextrose Digest" which have been the subject of discussion heretofore.

Trial Examiner Diggs: What do you offer them for?

Mr. DeBirny: I offer them in evidence for the purpose of showing the numerous companies which advertise "Dextrose" in connection with the sale of their products and I intend to show that this material was prepared by the advertising agency, the one of Corn Products Refining Company, and at their expense.

Trial Examiner Diggs: And do you further propose to follow that up by showing that there are other persons who purchase the products of these respondents who are not permitted to put advertising matter and material in this booklet or booklets?

Mr. DeBirny: Oh, no, this is not that type of a publication. Those are not advertisements. This is a house organ. It just shows how other people advertise. For instance, if you will just go through them I think it will become more apparent.

Trial Examiner Diggs: I want to get clearly on the record just what your offer is, and the purpose of it, 525 and how you propose to, if at all, follow it up.

526 Mr. DeBirny: Back on the record.

I withdraw at this time the offer of the "Dextrose Digest" marked for identification, Commission's Exhibits 61, 62, 63, and 64, and 65.

Trial Examiner Diggs: That may be noted, Mr. Reporter. (The documents heretofore marked for identification, "Commission's Exhibits 61, 62, 63, 64, and 65," were withdrawn.)

By Mr. DeBirny:

Q. Mr. Schmitt, do you have any knowledge of the advertising which was done in conjunction with the Lewis Candy Company of Massachusetts?

A. Knowledge of the advertising?

Q. Yes.

A. Why, I knew that they advertised and that they broadcast for a while. That is all I know about it.

Q. Did you have any connection whatsoever with that broadcasting or advertising?

A. Not a thing in the world.

Q. Do you perform any duties with Corn Products Refining Company aside from those as manager of the Confectionery Division?

A. The Corn Products Refining Company?

Mr. Hall: Sales Company.

527 Mr. DeBirny: Yes.

By Mr. DeBirny:

Q. Corn Products Sales Company?

A. That is all.

Q. Do you send to the Department of Agriculture statements as to the prices at which your products are sold?

A. Well, our office sends a price sheet when issued, a copy of it.

Trial Examiner Diggs: The question is, do you do it personally?

The Witness: No, I do not.

By Mr. DeBirny:

Q. Who does it?

A. That has been detailed to someone in the office.

Q. Have you done it in the past?

A. I have in the past sent out the market price of our materials.

Q. When did you stop doing that?

A. When the thing was assigned to somebody else. It became a routine matter every time the price changed, our copy of it goes along to—

Q. How long ago was that?

A. That I stopped? Definitely, I would not know. Possibly a couple of years ago.

Q. Well, those prices—that price information which  
528 you transmitted to the Department of Justice was not at all limited—

Mr. Hall: Department of Agriculture.

Trial Examiner Diggs: Yes, he said Department of Agriculture.

By Mr. DeBirny:

Q. That price information which you transmitted to the Department of Agriculture was not at all limited to candy ingredients?

A. It was a price list of materials, other materials which we sell.

Q. Did you formerly occupy a position where you had some duties in connection with all materials?

A. Only in the sales capacity.

Q. And what do you mean by that?

A. Well, I sold to other industries. My duties have been curtailed to cover a few industries. Previously I worked in a District Office which solicited all the business available in the market.

529 Mr. DeBirny: I would like to have this marked as Commission's Exhibit 66-A, 66-B, and 66-C.

(The document referred to, was marked "Commission's Exhibits 66-A, 66-B, and 66-C," for identification.)

Mr. DeBirny: I now offer this as Commission's Exhibit 66-A, 66-B, and 66-C.

Do you have any objection, Mr. Hall?

Mr. Hall: No.

✓ Trial Examiner Diggs: It may be admitted.

(The document referred to, heretofore marked for identification, "COMMISSION'S EXHIBIT 66-A, 66-B and 66-C," was received in evidence.)

By Mr. DeBirny:

Q. Take Commission's Exhibit 66, Mr. Schmitt, will you identify that? Tell us what it is.

A. Best of my knowledge, this is a complete list of brokers who are employed by our company for a two-year period from July 1, 1936, to July 1, 1938.

Q. Handling what products?

A. To my knowledge, bulk products. They may have had some package business, but I would not be familiar with that. I suppose for the most part they may handle package goods also.

Q. Mr. Schmitt, referring to Commission's Exhibit 66, was that material prepared by your Division of the

530 A. I had one of my clerks work on it.

Q. Are these brokers of candy?

A. They are our brokers.

Q. What is that?

A. They are our brokers. They sell our material.

Q. They sell products that are used by candy manufacturers?

A. Yes, they would sell corn syrup and corn starch.

Q. Do you know whether or not these brokers, listed on Commission's Exhibit 66-A, B, and C, purchase the commodities produced by your corporation on which they are paid brokerage?

A. With one exception, there is no such broker.

Q. Who is the exception?

A. Mr. Hall was an exception, I think.

(Mr. Hall hands paper to counsel for Commission.)

By Mr. DeBirny:

Q. Well, do I understand you then, to say that none of these brokers listed on Commission's Exhibit 66, purchase any of your goods?

Mr. Hall: Except one.

The Witness: Except—with that one exception, Borden and Remington.

By Mr. DeBirny:

Q. Where are they located?

A. Fall River, Massachusetts.

531 Q. Do these other brokers purchase your goods?

A. No, they do not.

Q. The goods which are sold through them are invariably billed to the ultimate consumer and not to them?

A. All invoices that are issued on material they handle, are billed direct to the customer. They simply act as our agency.

Q. In that respect, is the practice of Corn Products Refining Company different from that of the other corn refiners, do you know?

A. I do not know the practice of the other refiners.

Q. Are you personally acquainted with the business of Borden and Remington Company, at Fall River, Massachusetts?

A. No, I am not. They do very little for my Division, the Sales Department. They are in the mill district and their business does not run to confections at all.

Q. Do you know why the exception was made?

A. I do not.

Q. In there—

A. I do not.

Q. Do you know who would know?

A. Why, Mr. Mueller is thoroughly familiar with their contract.

Mr. DeBirny: At this time I offer for identification, a statement of "Carload sales made to our brokers from 532 July 1, 1936, to July 1, 1938," and also offer it as a Commission's Exhibit in evidence.

Trial Examiner Diggs: You offer it in evidence?

Mr. DeBirny: Yes.

Trial Examiner Diggs: Is there any objection?

Mr. McCollester: May I ask the relevancy of it? What allegation is that directed to?

Mr. DeBirny: This is directed to the question of whether or not this customer obtains the goods at a different price than the price paid by other purchasers of the same products.

Trial Examiner Diggs: Off the record.

533 Trial Examiner Diggs: Do you object or not object?

Mr. McCollester: I will object not to the authenticity, Mr. Examiner—of course, that is admitted—but I do not recall that there is any allegation in the amended complaint to which that exhibit would be relevant. I do not know any allegation involving sales to brokers.

Mr. DeBirny: This man, I understand, is not a—

Trial Examiner Diggs: Off the record.

Mr. DeBirny: Is not a broker but a purchaser of goods.

Mr. Hall: This is not on the record at all, please, Mr. Reporter.

(There was a discussion off the record.)

Trial Examiner Diggs: On the record.

My query is whether there is an objection to the offer.

Mr. McCollester: I am objecting.

Trial Examiner Diggs: The objection is overruled.

You may have an exception. The exhibit may be admitted in evidence.

(The document referred to, was marked "COMMISSION'S EXHIBIT 67," and received in evidence.)

By Mr. DeBirny:

534 Q. Do you know whether or not there is a contract covering these sales?

A. I do not.

Q. Did you not say a moment ago, that Mr. Mueller—

A. Mr. Mueller would be thoroughly—

Q. —Would have the contract?



A. He would be thoroughly familiar with the entire arrangement as it exists.

Q. Mr. Schmitt, have any candy manufacturers or other purchasers of glucose or dextrose, or cerelese, from the Corn Products Sales Company, ever requested you to contribute to the advertising material which they—or to their advertising activities, I will put it that way.

A. They never made any such request to me.

Q. Have any such requests ever been conveyed to you by any of your organizations?

A. You mean for participation beyond the advertised service in the books?

Q. Yes.

A. No.

Q. Have you discussed with Mr. Mueller of Helwig and Mueller, the advertising agencies, any cooperation of that nature with any of your customers?

A. Discussed with him—

Q. Yes.

535. A. —As regard to our participating in the—

Q. Yes.

A. I would not discuss with him. If I had a discussion like that, I would take it—

Trial Examiner Diggs: The question is, did you?

The Witness: No, I did not.

By Mr. DeBirny:

Q. Did you discuss it with anyone in the organization, in Corn Products Sales?

A. No occasion for it.

Mr. Hoopingarner: What was that?

(The Reporter read the last question and answer.)

Mr. Hoopingarner: No occasion for it.

By Mr. DeBirny:

Q. I understood you to say you did not.

A. I did not discuss it with him as I had no occasion to.

Mr. Hall: You mean by that last answer no confectioner has asked you to present a similar proposition to the company.

The Witness: Nobody asked me for anything like that.

By Mr. DeBirny:

Q. Who has the records of purchases by candy manufacturers from your company?

536. A. We have that in our office.

Q. Who would have that?

Does Mr. Mueller have that or do you have that?

A. It is all in Mr. Mueller's department.

Mr. DeBirny: Off the record.

537 Trial Examiner Diggs: All right, Mr. Reporter, on the record.

Mr. DeBirny: That is all I want to ask Mr. Schmitt now, but Mr. Hoopingarner wants to ask some questions and then we will be through with this witness.

Trial Examiner Diggs: You say you are going to ask the witness some questions?

Mr. Hoopingarner: Yes, I am going to ask a few here.

Trial Examiner Diggs: All right, proceed.

By Mr. Hoopingarner:

Q. When your salesmen go to candy manufacturers to sell them your corn syrup, what do you tell them—do you—do they tell these manufacturers about the service that you will render them in connection with the preparation of labels?

A. When they do discuss it, it would be along the general lines as outlined in the publication.

Q. Which publication?

A. The "Dextrose Digest" and, previous to that, the "Candy Kettle."

Q. Let me show you Commission's Exhibit 60, and ask if that is what you have just referred to.

A. No, I spoke of them generally. I do not even know the service is advertised in here.

Q. Where is it?

538 Mr. Hall: Exhibit 60 is not in the record.

Mr. McCollester: May I hear the question?

(The Reporter read the question.)

Mr. McCollester: All that, you know, is—

Mr. Hoopingarner: I beg your pardon.

The Witness: It is all in this line.

Mr. Hoopingarner: I object to any explanation here.

Trial Examiner Diggs: Just ask your question.

Mr. Hall: I object to the question. There is no Exhibit 60 in the record. It was overruled and not allowed.

Trial Examiner Diggs: Of course he cannot be interrogated about an exhibit not in the record. I sustained that objection.

539 Trial Examiner Diggs: Now on the record, Mr. Reporter.

Mr. Hoopingarner: Read the—will the Reporter kindly read the—

Trial Examiner Diggs: Read the last question.

Mr. Hoopingarner: Read the last question and answer and see what he said there.

Trial Examiner Diggs: Yes, read the question.

(The Reporter read the last question and answer referred to.)

Trial Examiner Diggs: Off the record.

—540 Trial Examiner Diggs: On the record, Mr. Reporter.

By Mr. Hoopingarner:

Q. The next question: "Is it?"

Mr. McCollester: Is it what?

Trial Examiner Diggs: Now how can you—

Mr. McCollester: I object to that question or to any question asked about Exhibit 60. You are asking the witness about an exhibit which does not exist.

Trial Examiner Diggs: Yes.

541 Trial Examiner Diggs: On the record.

By Mr. DeBirny:

Q. The question is, is it?

Trial Examiner Diggs: Now, Mr. Reporter, remember all that discussion was off the record.

Now ask the witness the question you have in mind, keeping in mind the last part of his answer.

Mr. Hall: Does your question mean is it in Exhibit 60?

Mr. Hoopingarner: Yes.

Mr. Hall: Then I object to it.

Mr. McCollester: Why don't you show him—

Trial Examiner Diggs: Off the record. Let's don't get back to the same thing.

Mr. Hoopingarner: I am just asking him to say whether it is or not.

Trial Examiner Diggs: Let him answer. Let us see whether that procedure is stated in that exhibit. Answer yes or no.

Mr. McCollester: As of what period?

Mr. Hoopingarner: I do not know.

Mr. McCollester: As of right now.

Trial Examiner Diggs: That is off the record.

Mr. Hoopingarner: Yes, put that off the record.

Trial Examiner Diggs: You can develop that after awhile.

542 Trial Examiner Diggs: Now on the record, answer that yes or no, Mr. Witness.

The Witness: Generally speaking it is. The wording of this is more or less geared for advertising. That really does not make definite statements. It was about ladies' headgears and so on and so forth.

By Mr. Hoopingarner:

Q. Will you look at the first part of this Exhibit 60 for identification and tell me whether what you said appears on the first page?

Mr. McCollester: I object, Mr. Examiner. That is trying to get into the record statements contained in the exhibit which were statements as of a period prior to the enactment of the Robinson-Patman Act.

Mr. Hoopingarner: No, it is not. I am asking about right now.

Trial Examiner Diggs: I am going to sustain the objection and going to let the witness make a definite statement after having read the record as to what the practice is. You may have an exception.

Mr. Hoopingarner: He has already stated it is in that.

543 By Mr. Hoopingarner:

Q. What else did your salesmen discuss with the candy manufacturers?

Trial Examiner Diggs: You understand this is on the record.

Mr. Hoopingarner: Yes, sir, I mean it to be.

By Mr. Hoopingarner:

Q. What else did your salesmen discuss with candy manufacturers?

A. Is that a question?

Q. No. I have not finished it.

A. I see.

Q. Along the same lines as the labels?

A. What is the question now?

Q. What else did your salesmen discuss with candy manufacturers along the same lines as labels?

A. Particularly as to advertising?

Q. Yes.

A. We offered the same kind of services particularly as to the technical services that we offered to the others, particularly as to that of which I have just spoken and the other is simply suggestions as to this advertising. We suggest labels, the kind of labels to be used by them, or anything

that they may care to submit. If they submit a rough copy we will work that up into a label and submit it back to  
544 them. We are glad to help them in that way.

Q. Labels?

A. Labels.

Q. And?

A. And copy if they want to prepare it.

Q. A copy of what?

Mr. DeBirny: Copy—advertising copy—advertising; advertising matter.

By Mr. Hoopingarner:

Q. Copy of what?

A. Any kind of advertisements that they intend to put out; any kind of advertising that they intend to do. We have nothing to do with that at all. Just whatever they submit.

Q. What is this copy to be used for?

A. For whatever purpose he advises it to be used; in other words, that is entirely up to him, he may put it in newspaper advertising, or whatever medium he decides to put it in. If they would like to have some anticipated newspaper copy edited by our advertising agency we would be glad to accept his rough draft and see what we could do with it.

Q. Anything else besides newspapers?

A. Whatever medium they use.

Q. I do not know what they use. I am asking you.

A. We have, I believe, written at their request a short continuity for radio advertising; that is, the advertising agency has drawn it up for some one minute  
545 speeches, and stuff of that sort, one minute spots, a man may want to go on a local station and did not feel qualified to write up his own advertising copy.

Q. Anything else?

A. I do not know of anything else offhand.

Q. No?

A. No.

Q. Are those things generally found in the exhibits which you have referred to before including Commission's Exhibit No. 60 for identification?

A. Generally found?

Mr. McCollester: What do you mean by that?

A. You mean in the general stuff?



By Mr. Hoopingarner:

Q. No.

A. As to the sum and substance of it, I would say it is in there if I understand what you mean.

Mr. McCollester: I object to that.

Trial Examiner Diggs: I sustain the objection so far as it relates to any exhibit which was published prior to the passage of the Robinson-Patman Act.

By Mr. Hoopingarner:

Q. You have merely stated—

Trial Examiner Diggs: We are going back to the same controversy that we have gone into before when this was offered in evidence and I do not see any use of going into it any further.

546 By Mr. Hoopingarner:

Q. Did your salesmen discuss with the candy manufacturers the question of the cost of advertising?

A. No.

Q. Nothing about cost?

A. The advertising? The salesmen know nothing about the cost of advertising.

Q. When you stated that your salesmen did discuss with candy people questions of advertising did you mean to limit that statement to the contents of the advertising?

A. Oh, no, as far as our salesmen are concerned they are specifically instructed to inform the customer that we have an advertising agency who would be glad to cooperate with them in their advertising as to the setup of advertisements and labels irrespective, and things of that sort, for instance, artistic work and so forth and so on. They do not discuss the amount of advertising as far as he is concerned. They arrange for their own advertising. We simply prepare or help to prepare some of the materials that he wants to use.

Q. Do you tell him at all as to what it may cost?

A. No.

Q. No.

Q. But it is in a certain newspaper or it is in a certain way that it is used?

A. I do not understand the question.

548 Q. You do not tell him as to what it may cost to advertise in a certain newspaper or in a certain way?

A. We do not know. We do not even ask him how he is going to use the advertising. He does not tell us whether he

is going to put it in the newspaper or magazine or what. In most cases we do not ask—

By Trial Examiner Diggs:

Q. (Interposing.) No, no. Just answer the question. If you do say you do, and if you don't say you don't.

A. No. We do not ask him what medium he is going to put the advertisements in. We are not interested in that.

By Mr. Hoopingarner:

Q. For radios?

A. On cost?

Q. Yes.

A. No.

Q. No?

A. No.

Q. What do they tell the candy manufacturers with reference to the service that you render?

A. Just that the service is available.

Q. Just that the service is available?

A. Just that the service is available.

Q. I don't get the last; am I quoting you correctly?

A. Yes.

549 Trial Examiner Diggs: He said that they just tell them that the service is available and you have already detailed that service, as to what it is, have you not?

The Witness: I did that.

By Mr. Hoopingarner:

Q. Have you given us all of that?

A. Have I what?

Q. Have you given us all the services that you furnish?

A. I do not know that exactly just in a general way. I would not know that exactly in fact, but only in a general way; that is, the preparation of their material.

By Trial Examiner Diggs:

Q. Do you know of any others?

A. I do not know of any others, offhand.

Q. That is the quickest way to get at it.

Mr. DeBirny: Mr. Hoopingarner; I think if you will just read this to him out of the exhibit, but make no reference to the exhibit, you can get the point that you have in mind, and get it in there properly.

By Mr. Hoopingarner:

Q. Well, since June 19, 1936, have your salesmen ever told any candy manufacturers this:

- "While all these services are offered gratis as part of a new sales service to increase the candy makers volume we do not, of course, finance the cost of the advertising, itself."

Mr. McCollester: I did not hear that, I wonder if you will repeat that, please.

By Mr. Hoopingarner:

Q. Well, since June 19, 1936, the date of the passage of the Robinson-Patman Act, have your salesmen ever told any candy manufacturers this:

"While all these services are offered gratis as part of a new sales service and to increase the candy makers volume we do not, of course, finance the cost of the advertising, itself."

Mr. McCollester: Oh, I see, you add the word "and" in there. Now, just a minute. I object to that unless it is limited to the witness' personal knowledge.

Trial Examiner Diggs: Of course, I am limiting it to his presence; that is, what took place in his presence, as I have indicated before.

A. I do not know what they said.

By Mr. Hoopingarner:

Q. Will you answer the question?

Mr. McCollester: He said that he did not know what they said.

Mr. Hoopingarner: I think the witness should be allowed to answer the question.

Mr. McCollester: He has already answered the 551 question.

Mr. Hall: He already answered it.

Mr. McCollester: He said he did not know what they said.

The Witness: I said I did not know what they said.

Mr. Hoopingarner: I am sorry. I did not hear you.

By Mr. Hoopingarner:

Q. Did you ever tell any of the candy manufacturers that?

A. I do not recall if the question was ever asked me directly or that I ever made the statement.

Mr. Hoopingarner: I ask that the answer be stricken and the witness directed to give a responsive answer.

Mr. McCollester: I hardly see how it could be more responsive.

By Trial Examiner Diggs:

Q. Did you ever tell them that?

A. I do not remember.

Trial Examiner Diggs: Did you ever tell them that; see if you can recall?

The Witness: I do not recall. I would not be able to put my hand on a specific instance.

Mr. Hoopingarner: What was the last answer?

Trial Examiner Diggs: The witness said he did not recall and he would not be able to put his hands on a specific instance.

The Witness: That is correct.

By Trial Examiner Diggs:

Q. Now, did you ever instruct any of your salesmen to tell the candy manufacturers this?

A. No, sir.

By Mr. Hoopingarner:

Q. I want to ask the witness that question very fully; did you ever instruct any of your salesmen to tell any of the candy manufacturers or all of them this:

"While all these services are offered gratis as part of a new sales service and to increase the candy makers volume we do not of course finance the cost of the advertising, itself."

Mr. Hall: Is that—what is that question, is that the same one all over again?

Mr. DeBirny: No, did he instruct his salesmen to tell the candy manufacturers that?

Trial Examiner Diggs: You are asking him the question whether he instructed any salesmen to make that statement?

Mr. Hoopingarner: Yes.

The Witness: Not specifically, to make that statement.

That is part of the general instructions.

553 By Mr. Hoopingarner:

Q. That is, general instructions are given by you?

A. Issued by the house. That is a house policy in regard to that item.

Q. I will ask that you—

Mr. Hoopingarner: I will ask that that answer be stricken and the question be answered as now stated.

The Witness: What was the question then?

Mr. Hoopingarner: I asked the question if those were general instructions given by him.

Trial Examiner Diggs: I thought he answered that.

The Witness: By me?

By Mr. Hoopingarner:

Q. Yes.

A. Well, I would relay those instructions to the salesmen.

Q. From whom did you get the instructions that you thus relayed?

A. Anything with reference to advertising?

Q. Just that question, please.

A. From whom I got them?

Q. Yes.

A. Through—there are several people.

Q. Name one.

A. Fred Mueller, he is my direct boss.

554 Q. Anybody else?

A. Buhrer. He would instruct me on several occasions.

Q. Anybody else?

A. No, I take my instructions from those two gentlemen.

Q. Now, have those instructions with reference to this one item I am still referring to come to you in writing?

A. Just discussions.

Q. What?

A. Just discussions.

Q. When did you last discuss this question?

A. Of this item?

Q. Yes.

A. Oh, now, you have got me a little confused as to whether I should tell the salesmen?

Q. No, when Mr. Buhrer was instructing you?

A. I have not discussed it with Mr. Buhrer at all.

Q. You have not discussed it with Mr. Buhrer at all?

A. No.

Mr. Hall: Now, I think the witness said he got some instructions.

Mr. Hoopingarner: I ask that all the questions be read back to the witness beginning with the question those general instructions are given by you so that he may recall just what he did testify to.

Mr. Hall: He did not say that. He said he got some 555 instructions.

Trial Examiner Diggs: Read the last question.

(The question referred to was read by the Reporter.)



556 By Mr. Hoopingarner:

Q. You didn't mean to say that, did you?

A. In regard to those several instructions that I relied—that I relayed to them—to the salesmen?

Q. What?

A. In regard to these specific instructions that I relayed, yes.

Q. Yes.

A. I did not discuss them directly with Mr. Buhner to my knowledge. That instruction was handed down to me or told to me as coming from the advertising committee a long time ago.

Q. When?

A. Well, I cannot put my finger on it (indicating a piece of paper) but that thing dates back several years. We have been generally advertising along the same line since.

Q. That is your best recollection?

A. My best recollection would be somewhere back in 1935 if you want the year.

Q. Yes. The specific question now is since 1935 have you received from Mr. Buhner any instructions to relay on to your salesmen to say this or not to say this:

"While all these services are offered gratis as part of a new sales service and to increase the candy makers volume we do not of course finance the cost of the advertising, 557 itself?"

Trial Examiner Diggs: Are you going to repeat that whole thing again?

558 Mr. DeBirny: Will you stipulate that your company is responsible for and continues from that date to this to repeat this statement here to their salesmen?

"While all these services are offered gratis as a new sales service and to increase the candy makers volume we do not of course finance the cost of the advertising, itself?"

Mr. Hall: No, I will not stipulate that because I don't know. If you want this witness to testify that our salesmen are not authorized to go around over the country and offer the same contract that we have with the Curtis Candy Company and the Bachman Candy Company, all right, because the salesmen were not authorized to do that and I will stipulate that they have no such authority.

Mr. Hoopingarner: We will take that stipulation, too.

What was the last question, now?

Mr. McCollester: Of course, there is nothing that really ties the two together, and seems to me that we are getting a lot of contradictory conflicting statements here.

Mr. Hall: Certainly not; if they are just exactly that. It is very confusing if we go along this way, just as Mr. McCollester says.

559 By Mr. Hoopingarner:

Q. The specific question now is, since 1935, have you received from Mr. Buhrer any instructions to relay on to your salesmen to say this or not to say this:

"While these services are offered gratis as part of a new sales service and to increase the candy makers volume we do not of course finance the cost of the advertising, itself!"

A. No.

Q. Since when have you—

Mr. Hall: I object to that.

A. The question is was I instructed since 1935 by Mr. Buhrer, and the answer is no.

By Mr. Hoopingarner:

Q. Now, let me ask you this question as to, the same question as to Mr. Fred Mueller.

A. No, I had no instructions from Mr. Mueller either.

Q. Well, on or about February, 1936, this question came to your attention, did it?

Mr. McCollester: I object as to what happened in February of 1936.

Trial Examiner Diggs: I want this on the record: I am going to confine the matters relating to this procedure to dates subsequent to the passage of the Robinson-Patman Act and I do not see what difference it makes what he 560 did before that date.

By Mr. Hoopingarner:

Q. Did you—

Mr. DeBirny: We will take an exception to that.

Trial Examiner Diggs: Exception noted.

By Mr. Hoopingarner:

Q. Did you give any written instructions to salesmen in addition to those contained in the Dextrose Digest and the Candy Kettle which you have referred to?

A. On occasion.

Q. On occasion?

A. On occasion.

Q. Did you have any occasion to give written instructions to salesmen calling on candy manufacturers containing the statement—

A. Well, all these services are free, gratis, as a part of—is that what you are talking about?

Q. Let me finish my question.

A. I am sorry.

Q. Did you have occasion to give any written instructions to salesmen calling on candy manufacturers containing the statement:

“While these services are offered gratis as part of a new sales service and to increase the candy makers volume we do not, of course, finance the cost of the advertising, itself.”

Now, did you give any such written instructions?

Mr. McCollester: Is your question limited subsequent to the passage of the Robinson-Patman Act?

A. Irrespective of the date I do not recall any.

Mr. McCollester: You do not?

The Witness: No.

By Mr. Hoopingarner:

Q. Did you?

A. I do not recall any such occasion.

Q. Did you ever, substantially, in writing, give a statement—give any such instructions?

Mr. McCollester: He says he does not recall.

A. I do not recall, on any occasion that I had any request of that kind. I do not have any and did not have any request for any financial assistance or something of that kind so I would not have any.

By Trial Examiner Diggs:

Q. No, the question is whether you gave instructions in writing to make or to give such instructions to your salesmen?

Mr. DeBirny: Can we have—

A. No.

By Mr. Hoopingarner:

Q. Did you have any—I will put it this way. Did you either in writing or otherwise make such statements to your salesmen?

A. Not to my knowledge.

Q. Since June, 1936?

A. No.

Q. Now, to get this clear, is it not a fact that you gave this stuff out when you put a salesman on, you give them instructions, of this character?

A. No, we take him around and train him personally. We do not just give out material and send salesmen out.

Q. You say that personally you have not, but you do have some sort of a code or instructions that you give your salesmen?

A. We instruct them personally.

Q. Just one question more, Mr. Schmitt. Substantially if you have instructed your salesmen to advise the customers to whom they sell products to be used in the manufacture of confectionery that you do not contribute to the advertising which those customers do?

A. That is right.

By Trial Examiner Diggs:

Q. That is, since June 19, 1936?

A. That is right.

By Mr. Hoopingarner:

Q. That has been continuous for many years?

A. Yes, sir.

563 Q. And up to the present time?

A. Yes, sir.

Q. And so far as you know your salesmen carry out these instructions?

A. So far as I know our salesmen carry out these instructions.

Mr. McCollester: Now, by "contribute" you mean contribute money for the customers' advertising?

Mr. DeBirny: That is right.

Mr. Hoopingarner: That is correct.

Mr. McCollester: Very well.

Trial Examiner Diggs: Gentlemen, in order to try to finish with this witness we have now gone until ten minutes after one. It becomes apparent that we cannot finish with him this morning so we will now adjourn until 2:30 this afternoon.

(Whereupon at 1:10 o'clock, p. m., a recess was taken until 2:30 p. m.)

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AFTERNOON SESSION

2:30 p. m.

Trial Examiner Diggs: All right, let's proceed.

E. W. SCHMITT resumed the stand and testified further as follows:

*Direct Examination (continued) by Mr. Hoopingarner.*

Q. Mr. Schmitt, you read the copy that goes in the Dextrose Digest, do you?

A. Yes, sir.

Q. You read the copy with reference to cerelose, have you?

A. They are all devoted to cerelose.

Q. What was that?

A. They are all devoted to cerelose.

Mr. Hall: Cerelose is tradename for Dextrose?

The Witness: That is a tradename for Dextrose.

By Mr. Hoopingarner:

Q. It is one of the tradenames for Dextrose, is it?

A. It is our tradename for Dextrose.

Q. Are there other tradenames for Dextrose?

A. Other people's products, yes.

Q. Do you have any other product that is Dextrose?

A. Any other product that is Dextrose?

Q. Yes, beside the Cerelose?

565 A. Except Dextrose as Dextrose in packages.

Q. Packages?

A. Yes.

Q. What is corn syrup?

A. That is converted starch.

Q. What is glucose?

A. Technically or the accepted term?

Q. Technically.

A. Well, technically I am not a technician to the extent that I can give you the chemical dictionary term for it; but as I understand, glucose technically it is actually Dextrose. The term glucose is used generally throughout the trade to mean corn syrup unmixd.



Q. When you use or when you approve advertising copy for some one such as a candy manufacturer in which it is stated that the candy is rich in dextrose, do you mean cere-lose?

A. Dextrose as dextrose. Cerelose—

Q. You mean cerelose?

A. Not necessarily cerelose. Cerelose is a trademark. Dextrose—it measures up as dextrose in the laboratory.

Q. Do you mean glucose?

A. No, Dextrose. Unless you are speaking of glucose technically. I do not refer to it technically at all.

Q. You do not mean it is rich in cerelose, do you?

A. Not necessarily that, but dextrose, either ours or 566 somebody else's.

Q. You can be made of glucose only and still be rich in dextrose?

A. Now you are proceeding on premises I am not qualified to answer you on.

Q. I am speaking about your advertising. When you prepare copy for advertising.

Mr. Hall: He does not prepare copy.

The Witness: I do not prepare advertising copy.

By Mr. Hoopingarner:

Q. Or approved copy for advertising—you mean, do you, that the candy which is being advertised has a dextrose in it which may be either glucose or cerelose, is that right?

A. No, it has dextrose as dextrose calculated to proportions sufficient to cover the advertising but I do not approve that proportion. I assume when the term is used that term is an acceptable term.

Q. Well,—

A. Possibly you are a little confused.

Q. No, I am not. I am not a bit confused.

A. Then I am as to your question.

Trial Examiner Diggs: Let me inquire at this point what is the purpose of this line of examination? There is no charge in this complaint about any misleading statement 567 concerning products or any unfair methods of competition. I understand the sole question now is under this Robinson-Patman Act.

Mr. McCollester: That is all.

Trial Examiner Diggs: So what has all this got to do with it?

Mr. DeBirny: It has got a lot to do with it, whether the allowance is made on equal terms.

Mr. Hall: What allowance?

Mr. DeBirny: Allowance to Curtis and to Bachman and to other people.

Trial Examiner Diggs: You mean to say they are selling two substances—one substance under different names?

Mr. DeBirny: No.

Trial Examiner Diggs: And one they charge one price for and the other another price, is that the idea?

Mr. DeBirny: No.

Trial Examiner Diggs: I mean to say a person is given a price of one commodity he is purchasing and a purchaser buying the article under another name is given another price, is that the idea?

Mr. DeBirny: No, it is not.

Trial Examiner Diggs: I would like to know what this is all about because otherwise I cannot see the relevancy of it.

568 Mr. Hoopingarner: We are charging here they sell a certain commodity.

Trial Examiner Diggs: Yes.

Mr. Hoopingarner: And in connection with that commodity they do give certain advertising or pay for certain advertising?

Trial Examiner Diggs: Yes.

Mr. McCollester: That is what you charge.

Mr. Hoopingarner: Yes.

We are asking what it is they sell; it is something which is stated like on the back of that Digest where it says cere-lose is dextrose, whether you can also say that dextrose is cerelose and it is also glucose, that is the question, Mr. Examiner.

Mr. McCollester: But you have not asked that question.

Mr. Hoopingarner: Yes. That is what I am trying to get.

569 By Mr. Hoopingarner:

Q. My question was in connection with advertising. First I will ask you when you sell the candy manufacturers what is termed dextrose what do you sell them?

A. Cerelese.

Q. When you sell to them dextrose do you also sell to them what is called glucose or corn syrup?

A. It is termed corn syrup. Some manufacturers also buy corn syrup.

Q. And you sell it to them as dextrose?

A. Absolutely not. We sell it as corn syrup. Two distinct commodities so far as the commercial field is concerned.

Q. When you approve advertising saying that candy is rich in dextrose—

A. Dextrose.

Q. —is it your idea to convey the meaning that it contains cerelose—that is rich in cerelose?

A. It is rich in dextrose.

Q. Will you answer the question, please?

Mr. McCollester: I think he has answered it. The point is—

Mr. Hoopingarner: I want him to answer yes or no.

Mr. McCollester: That is the same as "Have you stopped beating your wife?"

570 (The Reporter read the question as follows:

"Q. When you approve advertising saying that candy is rich in dextrose—

"A. Dextrose.

"Q. —Is it your idea to convey the meaning that it contains cerelose—that is rich in cerelose?

"A. It is rich in dextrose.")

Mr. McCollester: I submit he has answered.

The Witness: It is rich in dextrose.

By Mr. Hoopingarner:

Q. Answer the question yes or no then, please.

Mr. Hall: Can he?

The Witness: You are asking me whether it is cerelose. If I passed a piece of candy and it had the required quantity of dextrose in there, there is no method under the sun for me to determine whether it had my label on it when it was put in the bag.

Trial Examiner Diggs: As I understand the witness said this term cerelose is a tradename for dextrose, is that right?

The Witness: That is right.

Trial Examiner Diggs: So that that is the same thing.

Mr. Hoopingarner: I am not disputing that.

Mr. McCollester: Nobody would advertise it was  
571 rich in cerelose because nobody knows what cerelose is.

They say it is rich in dextrose because that term is understood.

By Mr. Hoopingarner:

Q. Will the witness please answer the question?

Mr. Hall: May I interpose the further objection that the witness testified he did not know anything about the advertising, he has nothing to do with it. He edits the books from the standpoint of typographical content and so forth. If you want that, get somebody who is qualified.

Mr. Hoopingarner: But he has testified that—

Mr. Hall: He has testified he does not know about the subject from a scientific angle.

572 By Mr. Hoopingarner:

Q. Would you say that it was—in other words, that it was cerelese?

A. I hope it is cerelese; I always hope it is mine.

Q. You hope it is cerelese, you always hope it is yours?

A. Yes.

Q. When you approve advertising to be used by a candy manufacturer to whom you sell only glucose and not cerelese and he is buying—and he is not buying any products made by some other manufacturer at all out of which to make his candy would you approve an advertisement which said, "This is rich in dextrose"?

A. I take it from your question you mean a manufacturer of candy to whom we are selling glucose and not cerelese, and who is buying dextrose from some other manufacturer what would we do?

Q. Yes.

A. May I answer that not yes or no, but I will tell you just what we do do, if anybody asks us to put our seal of approval on a specific slogan of that kind to which the advertising department has rules governing it, we would ask for a piece of the candy and we would make a chemical analysis of it and determine the actual amount of dextrose contained in it; in that particular piece of candy and we would report and I assume the report would be on the basis of that

573 analysis as to whether it is or not approved. In other words, we would make an analysis of the piece of candy, find out what is in it, and then study the wrapper and on the basis of that we would make our determination of whether we would approve or disapprove of it.

Q. Then you do not approve this advertising on the basis of the sales you make?

A. Absolutely not. It is on the particular item it is to cover.

Q. Who provides the chemical analysis part of this work?

A. It is a laboratory procedure.

Q. Who does that, who supervises that?

A. I guess Mr. Middleton, I would have to call the chief of the department.

Q. Do you get the candy from the manufacturer and turn it over to Mr. Middleton for his test?

A. We used to do that; it is a regular, routine procedure.

Q. And then how long will he keep it before he reports to you?

A. As quick as he can do it.

Q. Do you have any conversations with Mr. Miller of the Helwig-Miller Advertising Agency here in New York?

A. Frequently.

Q. Do you have any conversations with reference to the copy which may be used in advertising?

574 A. No, not specifically.

Q. What generally is the subject of your conversations?

A. For the most part I am trying to get some advice along the general line as to whether things are permissible, I just relay questions which are asked me and get his opinion on it. I am not familiar with advertising or its procedure, I am not.

Q. What do you sell to the Curtis Candy Company?

A. How much?

Q. What?

A. Corn syrup, cerelose.

Q. Do they buy any more cerelose in proportion to glucose than other candy manufacturers?

A. I am not familiar with the proportions that anybody buys in their entirety. May I say that I believe that they do buy considerably more.

Q. Would you say it was much or little?

A. Considerably more in proportion.

Q. In proportion?

A. Yes.

Q. To whom do you sell in the Curtis Candy Company?

A. That is a matter that is handled in our Chicago—you mean the individual in the company?

Q. Yes.

A. By our Chicago office, Mr. Cull.

575 Q. How do you spell that?



A. C-u-l-l, handles that exclusively.

Q. Mr. Cull?

A. Mr. Cull.

Q. Does he come under your supervision—Mr. Cull?

A. We work together.

Q. Together?

A. Yes.

Q. Do you receive from the Curtis or did you receive from the Curtis Candy Company a piece of candy which was analyzed for the purpose of determining whether it was rich in dextrose?

A. Their candy has been analyzed on several occasions by our laboratory and they maintain their own.

Q. The question is do you supervise that?

A. Me, personally?

Q. Yes.

A. No.

Q. And whom did they get, do you know?

A. Why I would imagine in advertising that particular item it would be first analyzed right in our Chicago laboratories, but they maintain their own laboratories.

Q. Did you get a piece of candy made by the Bachman people?

Mr. McColleston: I object to that.

576 By Mr. Hoopingarner:

Q. To be analyzed?

A. I have analyzed Bachman's candies. I have no objection to answering that.

Trial Examiner Diggs: Gentlemen, I want to know why we have to have all of this detail; that is, analysis. He has told you the general practice. Where do we get anywhere by this? He may have ten thousand, and you could go to each one of them individually. I will clarify that by asking the witness this.

By Trial Examiner Diggs:

Q. Is that the general practice that you use with all of your customers?

A. That is the general practice that we adhere to. However, we do not take the responsibility for what the merchandise under their labels of that kind. We have no control over production.

By Mr. Hoopingarner:

Q. Mr. Schmitt, you have heard of the term "individual cerelese sales service," have you not?

A. Yes, I have heard of the term, "individual cerelose sales service."

Q. By means of that service have you either by means of the publication of the Candy Kettle or by the publication of the "Dextrose Digest" or by personal representations made by your salesmen to the candy manufacturers ever stated to them this:

"Our special, individual cerelose sales service offers without charge the following:

(1) The furnishing of estimated costs for plans.

(2) And the plans for advertising."

A. We have.

Q. Did you do it in your Candy Kettle in your publication dated February, 1937?

A. If that is the one you have there and you are reading from it I assume it is so.

Mr. Hall: Why not offer it in evidence?

A. If that is the one you have in your hand I assume so. I do not know without looking at it.

By Mr. Hoopingarner:

Q. Here it is.

A. Is that the particular one? That is right, this is February, 1937.

Mr. Hoopingarner: I will ask that the February, 1937, issue of the Candy Kettle be marked for identification, Commission's Exhibit 68.

(The document referred to was marked "Commission's Exhibit 68" for identification.)

Mr. Hoopingarner: I also ask to have marked the April, 1937, issue of the Candy Kettle as Commission's Exhibit 69.

Trial Examiner Diggs: Mr. Reporter, you may mark that issue of the Candy Kettle as Commission's Exhibit 69 for identification.

(The paper referred to was marked "Commission's Exhibit 69" for identification.)

Mr. Hoopingarner: I offer Commission's Exhibits 68 and 69 in evidence.

Trial Examiner Diggs: Any objection?

Mr. McCollester: None.

Trial Examiner Diggs: They may be admitted, Mr. Reporter as Commission's Exhibits 68 and 69 in evidence.

(The papers referred to heretofore marked for identification, "COMMISSION'S EXHIBIT 68 and COMMISSION'S EXHIBIT 69," were received in evidence.)

By Mr. Hoopingarner:

Q. Mr. Schmitt, is dextrose a regular constituent of corn syrup?

A. Yes. It comes in conversion. You are not asking me if that is added directly as dextrose?

Q. It is a regular constituent?

A. It comes in the conversion. In the manufacture of corn syrup there is dextrose present.

Q. On the back of Commission's Exhibit 68 appears 579 an advertisement of Karo or rather a statement with reference to Karo and a statement made by Dr. Dafoe, "Karo is the only syrup served to the Dionne Quintuplets. Its maltose and dextrose are ideal carbohydrates for growing children."

Mr. McCollester: Is that correct?

The Witness: Ask Dr. Dafoe, he said so.

Mr. Hall: He said so.

By Mr. Hoopingarner:

Q. You approved the—

A. I do not touch that copy.

Q. —statement made there?

A. I do not touch that copy.

Q. I beg your pardon?

A. That is Karo Syrup's copy. I do not have anything to do with it.

Q. The dextrose referred to there is not the cerelese, is it, you referred to?

A. That is not cerelese.

Q. It is what?

A. It is part of the Karo syrup.

Q. That is corn syrup, is it?

A. Well, I do not know the exact formula for Karo syrup.

Mr. McCollester: That has been gone into.

By Mr. Hoopingarner:

Q. It is corn syrup?

580 A. Yes.

Mr. Hoopingarner: All right, thank you.

Mr. Hall: Do you know as a matter of fact whether dextrose is added?

The Witness: I do not. But in syrup form as it is put out it is not cerelese.

Mr. Hoopingarner: Well, I do not think there is anything more.

Oh, yes, let me ask this.

By Mr. Hoopingarner:

Q. Why is it, Mr. Schmitt, that in advertising such as that appearing in Commission's Exhibit 69 that you use the word dextrose and not the word cerelese where it says, "Our ice creams and candies, are enriched with dextrose, the energy sugar."

Mr. McCollester: When you say, "You use"—

Mr. Hoopingarner: What is the question? Read it, please, Mr. Reporter.

(The question was read as recorded by the Reporter.)

The Witness: The reason for that is I desire to have the public dextrose minded. Dextrose is a little known sugar in comparison to sucrose or cane sugar.

Mr. McCollester: My point is that when counsel said you use the word dextrose, that advertising was not 581 corn products' advertising; that is copy of some customer's advertising, I take it?

The Witness: This is a streamer that is used generally for dextrose advertising by most anybody that wants to advertise dextrose.

Mr. McCollester: But it is customer's advertising?

The Witness: It is customer's advertising. We would like to get everybody to put dextrose up somewhere.

By Mr. Hoopingarner:

Q. It is a piece of advertising you were trying to promote?

A. That is right.

Q. Is that right?

A. Yes.

Q. In which you approve or suggest to candy manufacturers?

A. I would suggest it to anybody who would give us advertising.

Mr. DeBirny: I want to ask the witness one question, and that is this:

By Mr. DeBirny:

Q. I understand you have the trademark of cerelese?

A. Yes.

Q. Now, I understand there are a number of people who manufacture dextrose: Clinton—

A. American Maize.

582 Q. —American Maize and you.

Why is it you advertise an unbranded name rather than your own branded name?

A. When a customer prepares advertising he does not mind advertising a commodity or listing a commodity, whereas he does not necessarily advertise your commodity, he wants to have the privilege of being flexible to have more than one source of supply. When he advertises dextrose, that leaves the door open to get it where he can.

Q. And of course, you want to help him all you can?

A. I cannot say that. I would like to have him put cerelese there, but it closes the gate for himself.

617 Wednesday, March 29, 1929 at 10:00 a. m.

JOHN D. BUHRER was thereupon called as a witness for the Commission and, having been previously duly sworn, testified as follows:

*Direct Examination by Mr. DeBirny.*

Q. Mr. Buhrer, with regard to the sales to the Keever Starch Company which are outside of the contract, why were those sales made at a different price than you customarily charge your other customers for goods of like grade and quality?

A. I am not familiar with any sales to Keever Starch Company. That does not come under my jurisdiction. If that was—if that was done, it was probably done in connection with the contract. I do not know anything about the Keever Starch Company contract.

Q. Well, you do know, don't you, that all of the sales to Keever Starch Company outside of the contract are constructed as coming under the Sales Department and calculated and handled by the Sales Department?

A. They pass through the Sales Department but I pay no attention to them whatever.

I do not get any credit for the sales to Keever Starch Company.

Q. Do you know why they pass through the Sales Department when others do not?

A. Just a matter of record, I assume.

There are others who can answer that question, but I cannot.

Q. Mr. Buhrer, with regard to the sales—with regard to the advertising arrangement with Curtis Candy Company by which Corn Products was to and did put up one hundred thousand dollars for advertising in three particular areas



and Curtis put up no money at all for that initial advertising campaign?

A. Well, I do not know just exactly what you refer to. We have a great many conversations with Curtis. I had them, our advertising department had them, our technical men had them. There was no—

620 Q. Your who?

A. Huh?

Q. I did not get the last.

A. Our technical men had them.

Q. Technical.

A. I do not think it was—I do not think there was any time when we agreed to put up money knowing Curtis was putting up plenty at the same time.

Q. Well,—

A. I don't think there was any definite understanding or basis at the time we started. We didn't know where we were going when we started with Curtis. We had no idea that we would continue more than a year when we went with Curtis the first time. We didn't know how successful this campaign was going to be. Our future course depended entirely on what success was obtained.

Q. Well now, do you know, whether or not this initial advertising campaign was run in three cities as—as started?

A. I don't recollect just where it started, but I am inclined to—my memory is that it—it was confined to one or two territories, because that's the way we always introduce a new product. We always take the town or a locality and we experiment with that locality. If we get results, then we spread out further, gradually, until it becomes national.

Q. This was not any new product though, was it?

621 A. Why, absolutely. We wouldn't—we wouldn't advertise "Baby Ruth" unless every package had dextrose on the label; and that took a long time for the stock in the hands of the trade to be sold and the new stock get on the shelves.

Q. No, but you had—I say, the dextrose was no new product?

A. Well, it was a new product to the housewife or the consumer, most decidedly. It wasn't a new product to the—to the—to the—to physicians and technical men.

Q. It was a new product to confectionery industry?

A. Substantially, yes. It hadn't been introduced. Our sales to confectioners at that time were extremely small.

As a matter of fact the first attempt that was—was with Lewis in '35.

Q. '35. And this was in the fall of '36, was it not?

A. Yes.

Q. And your sales at that time were in the—and had been for some time in the millions of pounds of this dextrose—

A. Yes, but eighty per cent. of our business—

Q. —to the confectionery business? What?

A. Eighty per cent. of our business was with bakers. We had no dextrose business in any other industry to speak of. That was our problem, to spread this dextrose idea to other industries, and we didn't know how to approach it.

Q. To other industries?

A. To other industries other than baking. The 622 bakers used it because they saved money. That's the reason they used it.

Q. If you wanted to spread it in the confectionery industry, why did you not advertise dextrose among the confectioners, in their journals, and so forth?

A. It wouldn't have done a bit of good. We had been advertising dextrose; we had been soliciting them. Wouldn't have done any good at all. It required a great deal of research with all of these companies that we advertise with, before they would even accept it. It took Schmering or Curtis Candy Company a whole year before he decided to go into this. He had to find out if he could use dextrose. We thought at the time that he would use as much as twelve million pounds the first year.

I don't think he bought a million and a half. That was after considerable research. He turned his plants over to our technical men and—and at considerable cost to both of us.

Q. Why did you think he would use twelve million pounds the first year?

A. Because we knew what his volume was and we thought we could put a certain percentage of dextrose in that volume. And we were fooled.

Q. Well, it was to get that percentage of volume, that twelve million pounds from Curtis that you entered into 623 the advertising arrangement?

A. No, it wasn't. We entered into the advertising arrangement because we thought it was a first class advertising campaign for dextrose. The twelve million was just velvet, that's all.

Q. Why do you say you were fooled?

A. Well, because twelve million pounds is a nice amount of business to shoot at. But our main object was to—was to publicize dextrose. That was worth much more to us than the twelve million pounds. You don't think we would spend \$600,000.00 for twelve million pounds of dextrose a year from one company. We'd lose money.

Q. You did not ever spend \$600,000.00, did you?

A. Well, we—yes, we did in the three years.

Q. You said just now one year.

A. Well, I said later—

Mr. Hall: He said in three years.

By Mr. DeBirny:

Q. In three years?

A. Yes.

Q. How much are you spending this year?

A. That all depends. All of our advertising appropriation is cancelable. We never—we never commit ourselves for more than three months at a time, and we wouldn't commit ourselves that far except that magazines require it.

624 Q. On other advertising we can stop tomorrow.

Q. Well, you have made an appropriation though for your advertising with Curtis this year, have you not?

A. We haven't definitely committed ourself. I may have the authority but—but we haven't—I haven't committed myself.

Q. Have you not tentatively planned to spend \$250,000.00, this year?

A. No, sir. No, sir.

Q. Was it 250,000.00?

A. I am authorized to spend it but I don't know whether I will or not.

Q. Who authorized you?

A. Well, my associates.

Q. Who do you refer to?

A. Well, I—the—the officers of our company.

Q. Specifically who?

A. Well, I discussed it—

Q. Specially who?

625 A. Well, I discussed it with Messrs. Sayre, Fischer, Mahana, Hall, Coggan, Campbell; and then after they had approved it, I had to take it up with our president, Mr. Moffett, and he said that—O. K.

Q. Did they authorize you to spend any funds with any other company in a similar manner?

A. Absolutely.

Q. They did.

A. They authorized—no, they didn't authorize me but they authorized me to bring up to them any other companies that I thought we could make a deal with similar to Curtis. And I have been trying to find some other companies, not only in the confectionery trade but in the citrus fruits, the beverage, the chocolate, and—well, those are substantially all.

Q. What is the basis today you are going to spend this two hundred thousand dollars with Curtis on?

How much will they have to put up?

A. Well, the last figures I had they were spending pretty close to ten to one on all advertising.

Q. No, no. I want to know how much they will spend this year in conjunction with this two hundred thousand dollars.

Mr. McColester: He has not said he would spend two hundred thousand dollars.

626 The Witness: I have not said we would spend two hundred thousand dollars.

By Mr. DeBirny:

Q. I am talking about tentative plans now.

A. Well, I can best answer that by saying how much they have spent to date in comparison with what we have spent.

Q. Don't you have any understanding with them this year as to how much they will spend in connection with the particular funds you are spending?

A. I am not concerned as long as they spend as much as two to three to one.

Q. In other words, it is immaterial to you whether they put up two hundred thousand dollars, four hundred thousand dollars, or six hundred thousand dollars?

A. No, because if I can get four dollars worth of advertising for one dollar, I am perfectly satisfied. That is a marvelous proposition for me.

Q. If you can get what?

A. Four dollars to one.

Q. If you can—

A. If I can spend one dollar and get four dollars' worth of advertising, that is a first class business proposition.

Q. If you can spend one dollar and get two dollars, is that the same?

A. Yes, sir. Depending, of course, on whether we

627 are getting into new fields.

Q. Well, definitely during the past three months, what percentage of the advertising on which your money has been spent has Curtis spent money?

A. Well, I cannot answer that because I have not gone into those figures. Our advertising agency handles all of our advertising appropriations and they have instructions that they follow in working that out and looking out for our interests.

Q. What are those?

A. Their instructions are that we obtain what I have just said.

Q. Did I understand you to say you do not know at the present time—

A. Not our '39, no.

Q. Do you know what percentage?

A. I know this; they are spending more than we are up to date.

Just how much, I do not have the figures.

Q. Whether they are spending \$230,000 to your \$200,000, you do not know?

A. We are not spending two hundred.

Q. It is on the basis of two hundred?

A. I am authorized to spend two hundred, but I said I do not know whether I will or not. I do not know  
628 whether I will spend the amount of money appropriated for Karo this year. We may cancel our advertising if conditions become such it is feasible or advisable.

Q. How do you know, Mr. Buhrer, what you are going to spend, and when do you know it?

A. Well, in each year we base our expenditure on the preceding year. We have advertising meetings once a week and we go over what we are doing. The advertising agency says—comes to us and we have got to release certain advertising if we want to get into certain magazines, and then we authorize it.

Q. Did you—

A. There might be a time when we will want to cancel it.

Q. Did you have such an advertising meeting this week?

A. We have not had an advertising meeting this week because I was away all last week and I have been extremely busy Monday and Tuesday.

Q. Did you have one the week before?

A. Yes, we have them almost every week.



Q. On the—at the meeting the week before, what percentage was Curtis putting up and what percentage were you putting up?

A. I do not think the subject of Curtis came up.

Q. When did the last one come up—when did the subject come up?

629 A. I do not remember. All of those subjects do not come up at every meeting. They only come up when it is necessary to release some advertising.

Q. Now none of this advertising material you spend is spent, as I understand it, on labels or anything of that nature. It is all on radios, newspapers, and national magazines, is that right?

A. That is right. Not a dollar is spent for labels or boxes or supplies of any kind. Nor does Curtis touch one dollar of what we appropriate.

Q. Yes. At the present time, can any candy manufacturer expect to start advertising dextrose on the radio or in the newspapers, and properly rely on your paying one-third of their advertising or one-half of the advertising?

A. Absolutely. If they comply with certain—if they can qualify.

Q. What are those qualifications?

A. Well, they have got to have at least fifteen per cent. of dextrose in their product. That is the first qualification.

Q. Yes.

A. The second qualification is that they must feature dextrose on their labels, their boxes, their store advertising material, and their men must be thoroughly posted on the dextrose content and be able to talk it, and they must  
630 be supervised by our agency as to what they say.

Now, if they can qualify to that extent, we will talk to them then.

Q. Yes, but will you enter into an advertising arrangement with them?

A. I would be very glad to on a basis of three for one.

Q. Will you enter into it with them on a basis of two for one?

A. I am inclined to think I would. Depending on their product, their distribution, their sales force, and the type of organization they have.

Q. What has the type of organization got to do with this advertising on the radio?

A. Well, it supplements your radio advertising. Your radio advertising is not worth anything unless you have an active and intelligent sales force and have proper distribution.

If you have no proper distribution, the radio advertising would be wasted practically because the consumers would be unable to find the product.

Q. Well, regarding—regardless of the type of salesmen, if the company purchased the dextrose and sold the candy and in that way moved the goods, it would be wholly immaterial, would it not, how the goods were moved?

A. That would be subject to our judgment, yes.

631 I am inclined to think that would be all right, but we would make a thorough investigation. If Hershey came to us tomorrow and wanted us to enter into an advertising campaign, I would not even investigate them because I know. I know what their distribution is, the reputation of their product, and the volume of their business. It would be a marvelous deal.

Q. Now, today, as I understand it, Bachman is buying your dextrose, selling candy, advertising on their boxes, their labels, the dextrose, and getting nothing in the way of a cooperative advertising allowance, is that true?

A. No.

Q: What is the answer?

A. The answer is that the Bachman "Athlete" bar is a failure.

Q. Well, I am not asking you what the Bachman "Athlete" bar is. I am asking if this is a fact, what I have just outlined.

A. Well the Bachman "Athlete" bar is only—that is the only product they sold in package form containing dextrose.

Q. They do not sell candy today?

A. They do not sell candy.

Q. Well, chocolate.

A. They sell—. Bachman has performed a very valuable service to us because Bachman was the first candy  
632 manufacturer to introduce dextrose into chocolate coating which was sold to the confectionery trade. He did a lot of experiments for us and we feel we are under obligation to him because he talked "dextrose" in coating.

That was the only thing that caused us to recognize Bachman as we did. I never had faith in Bachman making a success of a chocolate bar.

Bachman is a manufacturer and not a packager of candy bars. But we were under a great deal of obligation for the research he did for us and the introduction of chocolate coatings with dextrose to the confectionery trade.

That was our sole reason for entering into a deal with Bachman.

As a matter of fact, I personally opposed it but I was persuaded by our field men and our sales department to try it out.

Q. And you did—

A. The Bachman is a fine example of what I have just said. He has not a sales organization and you cannot put a product on the market even if you use radio and have a good manufacturing department, unless you have competent and experienced sales organizations.

Q. And the only reason you approved the Bachman deal was because of your feeling you were under obligation to Bachman?

633 A. Not the only reason.

Trial Examiner Diggs: He told the reason.

The Witness: The principal reason.

By Mr. DeBirny:

Q. The principal reason, I mean.

A. There were other reasons.

One other reason was that any advertising done at least advertised dextrose. We got our money in the actual advertising because dextrose's name was mentioned on the air.

Trial Examiner Diggs: I want to ask a question of the witness here.

By Trial Examiner Diggs:

Q. I understood you to say some time back that you would not join in any of this cooperative advertising unless the candy manufacturer used approximately fifteen per cent. of dextrose in his products, is that right?

A. In the confectionery business, yes. Because it would not be rich in dextrose unless it contained about fifteen per cent.

Q. Isn't your primary object in joining in these joint ventures the fact you want to get before the public the name "Dextrose", isn't that the primary object of it?

A. That is true.

Q. If that is true then, why would you not get it just  
634 as much before the public if you used only one per cent. as if you used fifteen per cent.?

A. Because the A. M. A. and the Federal Trade—I mean the—yes, the Federal Trade would not permit the statement “rich in dextrose” unless it had fifteen per cent.

The same way as butter fat.

Q. Leaving out the question of “rich” entirely. Why would you not get just as good results so far as calling your product, “dextrose”, to the public’s attention regardless of what percentage of dextrose was used in a given product?

A. Well, dextrose performs a certain function in the candy bar. It is a pep product. One per cent. in “Baby Ruth” would mean nothing. With fifteen per cent. in “Baby Ruth”, it would have an effect on your system.

By Mr. DeBirny:

Q. Well, what is the other eighty-five per cent. in the “Baby Ruth” bar?

A. Oh, it is peanuts, cane sugar, chocolate, milk.

Q. Is it not a fact, Mr. Buhner, that approximately forty-one percent. of glucose is dextrose?

A. You mean, glucose has forty-one per cent. dextrose content?

Q. Yes.

A. No.

635 I am not a technical man, but my impression is it has about twelve per cent. of dextrose.

Q. If one of your publications, such as the “Dextrose Digest,” contained that as a definite statement, would that cause you to amend your answer?

A. I do not—

Q. If your “Dextrose Digest” stated that glucose contains forty-one per cent. dextrose?

A. Well, I think if I saw that, I would question it, and it might be right and it might be wrong. I do not know.

Q. All right.

Mr. Buhner, your company in addition to this dextrose advertising arrangement with Curtis, spends large sums of money with the candy industry advertising candy is delicious food, but disassociated in any way with any particular manufacturer’s product. Is that not correct?

A. You mean did we enter into such a campaign?

Mr. Hall: No, no, that is not the question.

Read the question to him, Mr. Reporter.

Trial Examiner Diggs: Read the question.

(The question referred to was read by the Reporter.)

The Witness: Yes. Not large sums.

By Mr. DeBirny:

Q. It has been stated in various publications, that 636 several hundred thousand dollars have been spent. Is that incorrect?

A. That is incorrect. Unless you want to figure the time of experts which—but not that much money is appropriated.

Q. I see.

Well, approximately how much money have you spent in such advertising, not associated with any particular manufacturer?

Trial Examiner Diggs: What is the object of that?

Let us suppose he spent one million or fifty dollars; what issue in this case does that affect?

Mr. Hall: I am glad to have it in.

Mr. DeBirny: I think—

Mr. Hall: It will show the policy of trying to help the candy industry.

Mr. DeBirny: Yes, it will show the policy.

Mr. Hall: I do not think it is germane to the issues so far as—

The Witness: I think it is unfair to the company to measure the assistance we gave the candy industry in dollars. Because we conceived this plan of getting publicity for candy and the conception and performance were really worth a great deal more than the actual money it cost us.

By Mr. DeBirny:

Q. Well, I am not asking you if you feel it is unfair to disclose the sum of money.

A. The only reason is if I did and it was published, it would not place us in a proper light.

Q. That is all right.

Mr. Hall: You mean it is less than the public thinks.

The Witness: It is less than our customers think it is; but I take credit for having conceived the idea and performed it—

By Mr. DeBirny:

Q. Yes.

A. —And we did a good job.

Q. I am trying to develop—the Examiner asked a minute ago what the purpose of this is—that there is an opportunity if you want to help an industry and advance a product that it is feasible to do it without hooking it into any particular manufacturer's product and that you have done



so with the entire candy industry for the purpose of selling more dextrose and more glucose?

A. And complying with the request of the customer, getting—meeting his request.

Q. I did not get that last point.

638 A. And meeting his request.

That is, they come to us and ask us if we will join in such a campaign, and the act of doing it places you in a very favorable light.

Q. Uh-huh.

A. In other words, you are cultivating good will.

Q. Mr. Buhner, I show you Commission's Exhibit 69, at the bottom of page 3, with regard to the statement made by your company as to the amount of dextrose in glucose.

A. Well, I—I'm wrong probably, because I would say this was right. These are edited. It may be that I—my figure was—was based on the—the content of dextrose in Karo. I don't know. I—I'm not an expert; I can't qualify.

Q. Mr. Buhner, referring to this fifteen per cent. dextrose in candy, that fifteen per cent. of dextrose is solely dextrose in the coating of the candy and it isn't fifteen per cent. of both—of the whole piece of candy, is it?

A. It's fifteen per cent. of dextrose in the whole candy, yes. Whether it's in the coatings or in the glucose or in dextrose added.

Q. The center of the candy though is not made with dextrose?

A. Well, there are all kinds of candies.

639 Q. Chocolate candies?

A. Well, there are all kinds of chocolate candies.

Q. I see.

A. I don't know which ones you refer to.

Q. As to the particular Curtis bar we were talking about.

A. Well, Curtis has a great many different brands or—brands. Now, for example, I think "Butterfingers" contain a very high percentage of dextrose, whereas "Baby Ruth," I don't think contains as much as "Butterfingers."

Our aim of course is to get as much dextrose in as we can. But any manufacturer—any candy manufacturer who has fifteen per cent. of dextrose is privileged to put dextrose on his label. We haven't—we—we couldn't stop them. The Federal Trade would permit it and so would the A. M. A. They can all join in this campaign if they want to.

Q. Would you construe it as being improper to advertise fifteen per cent. of dextrose in a product that was made of glucose?

A. If the—if the bar contained fifteen per cent. of—of dextrose, whether it was in the glucose or not, I would say it was O. K.

Q. I see.

A. We do that as much to protect our customer and the —and dextrose as anything else. We have no axe to 640 grind there.

Q. Mr.—

A. We are advertising "dextrose." We want it advertised properly.

Q. Mr. Buhrer, why do you give the ten cents a hundred pounds preference in price to the large baking powder manufacturers?

A. Well, I would say to meet competition first, and second because of their being so large.

Q. Whose competition were you meeting?

A. Well, we would meet any manufacturer in our industry.

Q. Whom, specifically, did you meet though when you—

A. Well, we are meeting Staley and Clinton and—

Q. Did the—

A. And as a matter of fact Clinton took the Calumet Baking Powder away from us.

Q. Did Staley and Clinton give the ten cents a hundred before you did?

A. Well, I couldn't answer that question. I—if you want to know what I think, I think they give more than ten cents.

Q. No, when you started giving this ten cents, did you do it to meet competition or were you the initiators for it?

A. Well, that dates back pretty far. I couldn't say. 641 But I am—

Q. Since—

A. —Inclined to think that wherever—that our prices are all based on competition.

Q. Since the Robinson-Patman Act, it has simply been a continuation of what you had already been doing prior to the Patman Act?

A. That's right.

Q. Now, when the Patman Act was passed, was any consideration given to making this ten cents allowance to the other—

A. Yes.

Q. —Baking powder manufacturers?

A. Yes.

Q. And what was the conclusion?

A. Well, it was just delayed. Action was delayed. That was the only industry that I can recall where we didn't take prompt action after the Patman Act. But the difference in size between the ones we give the ten cents to and the others, is very, very big—tremendous difference.

664 Monday, September 30, 1940, at 9 A. M. E. S. T.

Mr. Hier: Now, then, Mr. Examiner, I have to read into the record at this time three stipulations the first of which concerns the Respondents' product, known as "Buffalo Corn Gluten Feed," and "Diamond Corn Gluten Meal," as follows:

"Since the last hearing in this matter counsel for the Commission and counsel for the Respondents have investigated further and in more detail matters brought out heretofore as to price discriminations in the sale of Buffalo Corn Gluten Feed and Diamond Corn Gluten Meal, and as a result thereof and in order to save the time and expense of extended hearings, the summoning of a large number of witnesses, the production of a great number of records and the extension of this record incident thereto, and to complete the testimony thereon, counsel for the Commission and counsel for the Respondents now stipulate and agree, that if witnesses were summoned by the Commission they would testify as follows:

1. That pursuant to the contracts and agreements already admitted in evidence as Commission's Exhibits 27 A, B, C, and 28, and succeeding contracts and agreements, respondents have, since June 19, 1936, sold to Cooperative GLF Mills, Inc., Buffalo, New York, Buffalo Corn Gluten Feed and Diamond Corn Gluten Meal at published market prices as follows:

Date	Feed	Meal	
June 19—December 31, 1936	29,917½ tons	2,070 tons	
1937	40,474½ "	770 "	
1938	36,078 "	1,221 "	
1939	58,652 "	2,796 "	

but based upon such purchases and pursuant to the terms of the contracts and agreements above referred to whereby respondents agreed to allow to Cooperative GLF Mills, Inc. an allowance from market price of 50 cents per ton on sales and shipments of both feed and meal in quantities of from 1,500 to 2,499 tons per month and of 65 cents per ton on both feed and meal on monthly shipments thereof in excess of 2,500 tons, respondents have paid to Cooperative GLF Mills, Inc. substantial sums of money.

2. That Cooperative GLF Mills, Inc. has resold these products, both unmixed and as ingredients in prepared, mixed or branded feeds of its own, to authorized agent buyers and retail stores owned or controlled by it in the States of New York and New Jersey, and the northern tier of counties in Pennsylvania.

3. That respondents have, since June 19, 1936, sold the products above referred to at full published market price without discount, allowance, commission, rebate or 666 other compensation in substantial quantities, to dealers in these products and feed mixers located in and doing business in New York, New Jersey, and Pennsylvania, who are in direct competition with Cooperative GLF Mills, Inc., in the resale of both products, unmixed or as substantial and essential ingredients in prepared, mixed or branded feed products.

4. That pursuant to the contracts or agreements already admitted in evidence as Commission's Exhibits 25 and 26, and succeeding contracts or agreements, respondents have, since June 19, 1936, sold to Allied Mills, Inc., Chicago, Illinois, Buffalo Corn Gluten Feed and Diamond Corn Gluten Meal at published market prices as follows:

Date	Feed		Meal	
June 19—Dec. 31, 1936	6,623	tons	1,702	tons
1937	11,446	"	2,252	"
1938	8,903	"	6,884½	"
1939	9,013	"	5,143½	"

but based upon such purchases and pursuant to the terms of the contracts and agreements above referred to, whereby respondents agreed to allow to Allied Mills, Inc. an allowance from market price of 50 cents per ton on sales and shipments, of both feed and meal of not less than 1,200 tons per month, respondents have paid to Allied Mills, Inc. substantial sums of money.

667 5. That Allied Mills, Inc., has resold these products both unmixed and as ingredients in prepared, mixed or branded feeds of its own to feed dealers in thirty-one states of the United States.

6. That respondents have, since June 19, 1936, sold the products above mentioned at full published market price without discount, allowance, commission, rebate or other compensation in substantial quantities to dealers in these products and feed mixers located in and doing business in a substantial number of the thirty-one states above referred to, which dealers and feed mixers are in direct competition with Allied Mills, Inc., in the resale of these products, unmixed or as substantial and essential ingredients in prepared, mixed or branded feed products.

7. That respondents have, since June 19, 1936, sold to E. W. Bailey and Company, Montpelier, Vermont, Buffalo Corn Gluten Feed and Diamond Corn Gluten Meal at published market prices as follows:

Date	Feed	Meal
June 19—Dec. 31, 1936	290 tons	0
1937	1,548½ "	110½ tons
1938	2,175 "	146 "
1939	1,968 "	141 "

but based upon such purchases and pursuant to an understanding and agreement therefor, respondents 668 have paid to E. W. Bailey and Company allowances at the rate of 50 cents per ton.

8. That E. W. Bailey and Company has resold these products both unmixed and as ingredients in prepared, mixed or branded feeds of its own to feed dealers in the States of Vermont, New York, New Hampshire, and Massachusetts.

9.—That respondents have, since June 19, 1936, sold their products at full published market price without any discount, allowance, commission, rebate or other compensation in substantial quantities to dealers in these products and feed mixers located in and doing business in the States of Vermont, New York, New Hampshire, and Massachusetts, which dealers and feed mixers are in direct competition with E. M. Bailey and Company in the resale of both products, unmixed or as a substantial and essential ingredient in prepared, mixed or branded feed products.

10. That the allowances granted by respondents to the aforementioned Cooperative GLF Mills, Inc., Allied Mills,



Inc., and E. W. Bailey and Company are sufficient, if and when reflected, in whole or in substantial part in resale prices, to attract business to Cooperative GLF Mills, 669 Inc., Allied Mills, Inc., and E. W. Bailey and Company away from their said competitors or to force said competitors to resell such feed and meal products at a substantially reduced profit or to refrain from reselling.

11. That the allowance granted by respondents to Cooperative GLF Mills, Inc., Allied Mills, Inc., and E. W. Bailey is sufficient to substantially increase their respective margins of profit over and above the margins of profit otherwise obtainable in the resale of such feed and meal products.

12. That respondents have, since June 19, 1936, sold to Jesse C. Stewart Company, Pittsburgh, Pennsylvania, Buffalo Corn Gluten Feed and Diamond Corn Gluten Meal at published market prices as follows:

Date	Feed	Meal
June 19—December 31, 1936	240 tons	90 tons
1937	840 "	170 "
1938	990 "	180 "
1939	915 "	175 "

but based upon such purchases and pursuant to an understanding, respondents have paid to Jesse C. Stewart Company an allowance of 50 cents per ton on such products resold unmixed.

13. That Jesse C. Stewart Company has resold these 670 products unmixed to feed dealers in the state of Pennsylvania and in the area immediately surrounding Pittsburgh, Pennsylvania.

14. That respondents have, since June 19, 1936, sold their products at full published market price without discount, allowance, commission, rebate or other compensation in substantial quantities to dealers in these products located in and doing business in Pennsylvania and in the area immediately surrounding Pittsburgh, Pennsylvania, who are in direct competition with Jesse C. Stewart Company in the resale of both products.

15. That respondents have, since June 19, 1936, sold to Marshfield Milling Company, Marshfield, Wisconsin, and Farley Feed Company, Janesville, Wisconsin, Buffalo Corn Gluten Feed and Diamond Corn Gluten Meal at published market prices as follows:

*Report of Proceedings.*

Date	Marshfield Milling Company	
	Feed	Meal
June 19—December 31, 1936	155 tons	165 tons
1937	341 "	141 "
1938	157 "	120 "
1939	180 "	50 "

Date	Farley Feed Company	
	Feed	Meal
June 19—December 31, 1936	10 tons	10 tons
1937	93 "	73 "
1938	50 "	70 "
1939	69½ "	68½ "

671 but based upon such purchases and pursuant to an understanding, respondents have paid to the Marshfield Milling Company and the Farley Feed Company allowances at the rate of 50 cents per ton on these products resold unmixed by them.

16. That Marshfield Milling Company and Farley Feed Company have resold these products unmixed to feed dealers in the State of Wisconsin.

17. That respondents have, since June 19, 1936, sold their above mentioned products at full published market price without discount, allowance, commission, rebate or other compensation in substantial quantities to dealers in these products located in and doing business in the State of Wisconsin who are in direct competition with Marshfield Milling Company and Farley Feed Company in the resale of these products.

18. That the allowances granted by respondents to the aforementioned Jesse C. Stewart Company, Marshfield Milling Company and Farley Feed Company are sufficient, if and when reflected, in whole or in substantial part in resale prices, to attract business to Jesse C. Stewart Company, Marshfield Milling Company and Farley Feed Company away from their said competitors or to force said competitors to resell such feed and meal products at a substantially reduced profit or to refrain from reselling.

19. That the allowance granted by respondents to Jesse C. Stewart Company, Marshfield Milling Company and Farley Feed Company is sufficient to substantially increase their respective margins of profit over and above the margins of profit otherwise obtainable in the resale of such feed and meal products.

Respondents state they have not produced and will not produce any evidence that the allowances granted by respondents to the six customers hereinabove mentioned do not make more than due allowance for differences, if any, in the cost of manufacture, sale or delivery of respondents' feed and meal-products resulting from differing methods or quantities, if any, which such products are to such purchasers sold and delivered by respondents."

Have I dictated these facts correctly, Mr. McCollester?

Mr. McCollester: You have.

Mr. Hier: It is further stipulated and agreed by and between counsel for the Commission and counsel for Respondents that the above facts are in addition to the testimony already taken, and the Exhibits introduced in connection therewith.

And it is further stipulated and agreed that the foregoing facts constitute all of the testimony or evidence to be presented to the Commission by either counsel for the Commission or counsel for the Respondents on the charge of discrimination in the price of respondents' feed products under Count I of the complaint.

Is that correct, Mr. McCollester?

Mr. McCollester: Yes.

Mr. Hier: The second stipulation which we have for the record refers to testimony previously taken, and alleged discriminations in connection with the sales to the Keever Starch Company, Stein, Hall and Company, and Stein, Hall Manufacturing Company.

I shall now read this into the record:

"For the same reasons as heretofore set forth, counsel for the Commission and counsel for the Respondents now stipulate and agree for the purposes of this proceeding that with reference to price discriminations by respondents in the sale of starches and starch products as disclosed by testimony and exhibits introduced in the record under the allegations of Count I of the complaint, witnesses, if called, will testify as follows:

1. That since June 19, 1936, and continuing up to the present time, respondents have sold and delivered substantial quantities of starches and starch products to Keever Starch Company of Columbus, Ohio, hereinafter referred to as Keever, and to Stein, Hall and Company of New York, New York, and/or Stein, Hall Manufacturing Company of Chicago, Illinois, hereinafter referred

to as Stein Hall, for use, consumption, and resale within the United States and the District of Columbia, and that respondents have similarly sold substantial quantities of starches and starch products of like grade and quality to individuals, firms, partnerships, and corporations located in the several states of the United States who are competitively engaged with Kever and Stein Hall in the use, consumption, and resale of such products;

2. That said sales were made by respondents to Kever at the prices shown in Exhibits 9A to 14-S inclusive, already admitted in the record, and to Stein Hall at the prices shown in Exhibits 94 to 117 inclusive, already admitted in the record, which prices reflected a substantial discount, rebate, commission or other allowance from the then current market or list prices; and that sales to said competitors of Kever and Stein Hall were made at the then current market or list prices without any discount, rebate, commission or other allowance;

3. That the discount, rebate, commission or other 675 allowance granted by respondents to Kever and to Stein Hall is sufficient to substantially increase their respective margins of profit over and above the margins of profit otherwise obtainable in the use, consumption, and resale of such starches and starch products;

4. That the discount, rebates, commission or other allowance granted by respondents to Kever and to Stein Hall is sufficient if and when reflected in whole or in substantial part in resale prices to attract business to Kever and to Stein Hall away from their said competitors or to force said competitors to resell such starches and starch products at substantially reduced profit, or to refrain from reselling;

5. That the discount, rebate, commission or other allowance granted by respondents to Kever and to Stein Hall may be sufficient to attract the business of such purchasers away from competitors of respondents or to force said competitors to sell such starches and starch products at substantially reduced profit, or to refrain from selling;

Respondents state that they have not produced and will not produce any evidence that the discount, rebate, commission or other allowance granted by respondents to

676 Kever and to Stein Hall, respectively, do not make more than a due allowance for differences, if any, in the cost of manufacture, sale or delivery of respondents' starches and starch products resulting from differing meth-

ods or quantities, if any, which such products are to such purchasers sold and delivered by respondents.

It is further stipulated and agreed by and between counsel for the Commission and counsel for Respondents that the above facts are in addition to the testimony already taken, and the Exhibits introduced in connection therewith.

And, it is further stipulated and agreed that the foregoing facts constitute all of the testimony or evidence to be presented to the Commission by either counsel for the Commission or counsel for the Respondents on the charge of discrimination in the price of respondents' starches and starch products under Count I of the Complaint."

Is that correct, Mr. McCollester?

Mr. McCollester: It is.

Mr. Hier: The third stipulation which we will read into the record at this time has to do with the testimony already offered and exhibits in the case referring to the Huron Milling Company and Kever Starch Company.

I now read that into the record:

677 "For the same reasons as heretofore set forth, counsel for the Commission and counsel for the Respondents now stipulate and agree for the purposes of this proceeding that with reference to Count III of the complaint witnesses, if called, will testify as follows:

1. That prior to April 21, 1927, Huron Milling Company of Harbor Beach, Michigan, was engaged in the business of manufacturing and selling substantial quantities of starches and starch products, manufactured from corn, and that prior to July 12, 1932, Kever Starch Company of Columbus, Ohio, was similarly engaged in the manufacture and sale of such starches and starch products;

2. That on said dates, respectively, the respondents contracted with Huron Milling Company, as set forth in Exhibits 1-A to 1-K, and with Kever Starch Company, as set forth in Exhibits 70-A to 70-E, 71, 72, 73, and 74, to sell each, respectively, its entire requirements of starch and starch products manufactured from corn;

3. That the prices at which said starches and starch products were therein contracted to be sold and at which they have been sold to said purchasers, did and do approximate or were and are below the cost at which said starches and starch products were then and since could have been manufactured by said Huron Milling Company and Kever Starch Company;

678



4. That said starches and starch products were sold for use, consumption and resale within the United States, territories thereof and the District of Columbia;

5. That, in that said contracts are for the entire requirements of said Huron Milling Company and Keever Starch Company, respectively, said contracts require for their performance that said purchasers refrain from using or dealing in starches and starch products manufactured by a competitor or competitors of respondents, and the parties thereto so understood the meaning of such provision and the effect of its performance;

6. That said contracts have been and are doing faithfully performed by said purchasers and in so doing they have refrained and are refrained from using or dealing in starches or starch products manufactured by a competitor or competitors of respondents;

7. That although said purchasers in said contracts reserved the right to manufacture and sell starches and starch products manufactured from corn by their own facilities, the prices charged them therefor in said contracts

by the respondents are so satisfactory to said purchasers that since the execution of said contracts, respectively, said purchasers have wholly ceased the manufacture of starches and starch products from corn;

8. At times and from time to time one or more of such competitors was and has been ready, willing, and able to supply some of said purchasers' requirements of said products;

9. That the effect of the execution and performance of said contracts may have been to substantially lessen competition between the respondents and their competitors, and may have tended to create a monopoly in the respondents in the sale and distribution of starches of the type manufactured by respondents for such purchasers;

It is further stipulated and agreed by and between counsel for the Commission and counsel for the Respondents that the above facts are in addition to testimony already in the records and the exhibits introduced in connection therewith, and further, that there are no other or additional facts to be presented either by stipulation or by testimony to the Commission under Count III of the complaint."

Is that correct?

680 Mr. McCollester: It is.

Trial Examiner Hornor: Are all these stipulated to by counsel for the respondents?

Mr. McCollester: They are, your Honor.

687 Tuesday, October 1, 1940 at 1 p. m.

Mr. Hier: The stipulation is offered by counsel for both parties, subject, of course, to the acceptance of and the approval by the Commission.

Trial Examiner Hornor: All right, sir. You may read it, then.

Mr. McCollester: "In order to avoid extended hearings, counsel for the Commission and counsel for the respondents now stipulate and agree, for the purposes of this proceeding, that if hearings were held and witnesses were called at such hearings to testify with reference to the matters alleged in Count I of the complaint as amended and re-  
688 spondents' answer thereto, such witnesses would testify as follows and that the following may be accepted by the Commission for the purposes of its determination herein in lieu of such testimony:

1. That for many years and since June 19, 1936, respondents have been and are now manufacturing glucose or corn syrup unmixed in their plants located at Chicago, Illinois, and Kansas City, Missouri, and have sold and shipped and are now selling and shipping from such plants, such glucose in commerce between and among the various states in the United States from the states in which such plants are located across state lines to purchasers thereof located in states other than the states in which respondents' said plants are located, in competition with other corporations.

2. That at all times since June 19, 1936 and while engaged as aforesaid in commerce among the several states of the United States, the respondents have been and are now selling and shipping from their plants located in Chicago, Illinois, and Kansas City, Missouri, glucose or corn syrup unmixed of like grade and quality to purchasers, some of which purchasers are located in the following cities: Chicago, Illinois; Kansas City, Missouri, St. Joseph and  
689 Springfield, Missouri; Fort Smith, Arkansas; Hutchinson, Kansas; Lincoln, Nebraska; Sioux City, Iowa; Waco, Sherman, and San Antonio, Texas; Denver, Colorado; and Salt Lake City, Utah. That whether such sales have been and are fulfilled by shipments from respondents' plants at Chicago, Illinois, or by shipments from their plant at Kansas City, Missouri, has depended and de-

pende in each instance upon the conditions at these respective plants, and has been and is entirely within the judgment and control of respondents. With the exception of a few sales, shipments to fulfill which were made from the plant at Chicago, Illinois, such sales to purchasers located in all of the cities enumerated above except Chicago, Illinois, were fulfilled by shipments from the plant at Kansas City, Missouri, and a substantial number of the sales to purchasers located in Chicago, Illinois, were fulfilled by deliveries out of respondents' filling station in Chicago to which glucose had been shipped by respondents from both of their said plants, and a few such sales were fulfilled by shipments to customers in Chicago directly from respondents' Kansas City plant.

Many of such purchasers located at the points designated also purchased glucose from competitors of respondents.

3. That on the following dates respondents have sold their glucose or corn syrup unmixed to such purchasers at the delivered prices per cwt. set forth below opposite the names of their respective cities, which prices are for 43 degree B $\alpha$ ume glucose when delivered in tank cars, or at such prices plus the uniform differentials set forth in Paragraph 5 following when delivered in other containers:

Location of Purchaser:	August 1 1936	August 1 1937	August 1 1938	August 1 1939
Chicago, Ill.	\$2.94	\$3.04	\$2.29	\$2.09
Kansas City, Mo.	3.32	3.40	2.69	2.49
St. Joseph, Mo.	3.32	3.40	2.69	2.49
Springfield, Mo.	3.32	3.40	2.69	2.49
Ft. Smith, Ark.	3.58	3.64	2.94	2.74
Hutchinson, Kan.	3.53	3.60	2.90	2.70
Lincoln, Neb.	3.37	3.45	2.74	2.54
Sioux City, Ia.	3.32	3.40	2.69	2.49
Waco, Texas.	3.77	3.82	3.14	2.94
Sherman, Texas.	3.68	3.74	3.06	2.86
San Antonio, Texas.	3.74	3.84	3.17	2.97
Denver, Colo.	3.79	3.64	2.95	2.75
Salt Lake City, Utah.	3.79	3.74	3.06	2.86

That at all times between the dates set forth substantially the same differences in and the relationships between and among said prices above illustrated have existed as to 691 such purchasers so located. That the prices above set forth were charged to and paid by such purchasers re-

and less of whether the glucose or corn syrup unmixed was shipped to such purchasers in the cities enumerated from respondents' plant at Chicago, Illinois, or respondents' plant at Kansas City, Missouri.

4. That the prices above set forth were determined by respondents by adding to the prices shown for Chicago on the dates set forth, respectively, the then effective local railroad freight rate from Chicago to destination, without reference to whether the sales would be fulfilled by shipment from Kansas City or from Chicago. Such rates together with similar rates from Kansas City to the same destinations were as follows:

	August 1, 1936		August 1, 1937		August 1, 1938		August 1, 1939	
	Kansas		Kansas		Kansas		Kansas	
	Chicago	City	Chicago	City	Chicago	City	Chicago	City
Chicago, Ill.	---	38	---	36	---	40	---	40
Kansas City, Mo.	38	---	36	---	40	---	40	---
St. Joseph, Mo.	38	08	36	08	40	09	40	09
Springfield, Mo.	38	35	36	33	40	36	40	36
Fort Smith, Ark.	64	42	60	40	65	45	65	45
Hutchinson, Kansas.	59	35	56	33	61	36	61	36
Lincoln, Neb.	43	12	41	12	45	13	45	13
Sioux City, Iowa.	38	23	36	22	40	24	40	24
Waco, Texas.	83	62	78	58	85	63	85	63
Sherman, Texas.	74	52	70	49	77	54	77	54
San Antonio, Texas.	85	67	80	63	88	69	88	69
Denver, Colorado.	85	68	60	51	66	56	66	56
Salt Lake City, Utah.	85	82	70	61	77	67	77	67

(Figures are in cents per 100 pounds.)

5. That such glucose or corn syrup unmixed has been and is being sold by respondents in several types and sizes of containers at prices per cwt. which increase over the tank car price per cwt. according to the type and size of the containers, as follows:

Container	Additional price per cwt. over tank car price
Barrels	\$0.33
Half Barrels	.56
Ten Gal. Kegs.	.98
Five gal. kegs	1.08
Ret. Steel drums	.13 where there is no return freight paid on empty drums.

- " " " .18 where the return freight on the empty drum is between 50 cents and 75 cents per cwt.
- " " " .23 where the return freight on the empty drum is between 76 cents and 90 cents per cwt.

693 Container Additional price  
per cwt. over  
tank car price

- Ret. Steel drums " " " \$ .28 where the return freight on the empty drum is between 91 cents and \$1.00
- " " " .33 where the return freight on the empty drum is more than \$1.00 per cwt.
- Tank trucks .10 where delivered by respondents equipment.
- " " .02 where delivered by customers equipment.

6. That purchasers located in the cities enumerated above are candy manufacturers who purchase glucose or corn syrup un-mixed of like grade and quality for use in the manufacture of candy and are competitively engaged in the sale of such candy to various customers, including chain stores, wholesalers and retailers, located in the various states of the United States. Such glucose or corn syrup un-mixed is used as an ingredient to some extent in the manufacture of most kinds of candy and is one of the major raw materials used in the production of many varieties, constituting from five to ninety per cent. of the finished weight thereof.

694 Generally the syrup is used in greatest proportion in candies which are sold by such candy manufacturers at about a few cents per pound and at narrow margins of profit. The higher prices paid for such syrup by such candy manufacturers located in the cities enumerated other than Chicago, Illinois, result to a greater or lesser degree in higher material costs than those of manufacturers in Chicago, the degree in each instance depending upon the difference in price and the proportion of syrup used in the particular candy manufactured. As to candies priced at but a few cents per pound and bearing no differentiating name or brand, candy manufacturers may attract customers by selling such candies at only a small fraction of a cent per



pound lower than a competitor. This is especially true in selling such candies to chain stores and other purchasers of large quantities, to whom such a small difference is determinative in placing their business. Under such circumstances, candy manufacturers paying the higher prices for such syrup than competitors may attempt to recover such increased costs by increasing the price of such candies or make only selected sales on a non-price or other basis. Unless other cost factors are present, the result in either case is to reduce profit pro tanto. This result may occur 695 either directly through the absorption of higher syrup costs in the sale of candies at competitive prices or indirectly through a reduced volume of sales, or the result may be to diminish the ability of those paying the higher prices for syrup to compete with those paying the lower prices. These results may be avoided or augmented by differences in the costs to such candy manufacturers of such other factors as labor, taxes, rents, insurance, other ingredients, proximity to markets and delivery of the finished candies no matter how such differences are brought about.

7. That respondents' plant at Chicago began operations in 1910 and respondents' plant at Kansas City was constructed and began operations in 1922. The method employed by respondents in determining the delivered prices of their glucose or corn syrup unmixed to candy manufacturers located at the cities listed in paragraph 3 has been uniformly employed by respondents since 1910 or prior thereto. Some of such candy manufacturers were located at the cities listed in paragraph 3 before the construction and operation of respondents' Kansas City plant and some candy manufacturers formerly located at such cities have, since 1922, relocated in Chicago.

That is the end of what we agreed the witnesses, 696 if they were called would testify to.

It is further stipulated and agreed that unless mutually agreed to by the parties hereto, or unless otherwise ordered by the Commission, no further evidence will be presented to the Commission by either counsel for the Commission or counsel for the Respondents on the charge of discrimination in price of Respondents' bulk glucose under Count I of the complaint as brought about by the pricing method hereinabove referred to.

Respondents state that they have not produced and for the purposes of this proceeding, with reference to the dif-

ferences in the prices of glucose or corn syrup unmixed set forth in paragraph 3, in the stipulation just read, will not produce any evidence intended to show differences in costs of manufacture and sale (excluding freight rates) as between their Kansas City and Chicago plants.

Respondents further state that they have not and in this proceeding will not offer evidence intended to show that all the additional charges over the tank car prices per cwt., as set forth in paragraph 5, of the stipulation just read, do not make more than due allowances for the differences, if any, in the cost of sale and delivery of such glucose in the various containers other than tank cars compared with 697 the cost of sale and delivery in tank cars."

Do you agree, Mr. Hier?

Mr. Hier: Oh, yes, of course.

Counsel for both sides agree that this stipulation represents what it purports to do.

Counsel for the Commission object and reserve exception to the consideration of the statements in Paragraph 6 of the stipulation just read as to the cost factors other than the cost of glucose as being immaterial and irrelevant to the issue in this case.

. . . . .

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JOHN D. BUHRER was recalled as a witness for the Commission and, having been previously duly sworn, testified as follows:

*Direct Examination by Mr. Hier.*

Q. This is Mr. Buhrer, and you previously testified in this case?

A. That is true.

Q. You are connected with the Corn Products Refining Company and Corn Products Sales Company?

A. I am connected with the respondents.

. . . . .

701 Q. When they make a change in the price of glucose, is that made without consultation with you?

A. I am the one that starts it.

Q. What factors do you take into consideration when you make up your mind or determine to initiate a price change?

A. Well, first, we always follow our competitors.

Q. Yes.

A. Second, if we initiate a change, I am influenced by our cost sheets which I get every Monday morning. If I think that our profits are below normal, I then go in and talk to some of my associates and tell them that I would recommend a price advance. If our profits are above normal, I recommend a decline. We discuss it amongst four or five of us, and then we put it into effect.

Q. Now, that determination is always made by the 702 Home Office here at New York?

A. By the New York office.

Q. What factors, as distinguished from a decrease, what factors lead you to increase the price?

A. Below normal profits.

Q. Below normal profits?

A. Below normal profits.

Q. Does competition have anything to do with that?

A. Decline?

Q. Increase.

A. Advance?

Q. Yes.

A. Competition would not have any influence on it.

Q. But on a decrease, what factors as distinguished from an increase?

A. If we hear that competition was making lower prices to certain customers, I think we might decline, and if we had too large a profit, we certainly would.

Q. Now, then, I would like to have you look at these sheets of figures here which your counsel gave me.

A. Yes (witness inspects a certain sheet of paper).

I really cannot tell you very much about this. This is just as much Greek to me as it is to you, probably more.

Q. I only desire to inquire of you about this particular column here. I would like to know whether you can tell me what influenced you to make the changes in each of these cases?

A. I could not do that, offhand.

Q. I will get at it this way: Mr. Buhner, the price changes since June 19, 1936, down until December 31, 1939, are supposed to be on this sheet (indicating a sheet). I will ask you to look at those price changes and tell me whether or not you can either from memory or from any record in your company, state that the change either was

made up or down, was made to meet competition, or was made because of increased profits becoming necessary, or because you were making too much money.

Mr. McCollister: Keep the record clear on our position, Mr. Examiner. Object to the question as not coming within the scope of this examination, not calling for any information relative to the issues in this case. There is no allegation in the complaint relating to price changes or reasons for price changes, or raising any issue to indicate the necessity of the information which would be elicited by an answer to that question.

Mr. Hier: There is an issue in the statute, always, about meeting competition; the witness has testified that he makes changes to meet competition.

704 Q. I want to draw from him either the statement that he made those, or he did not make those to meet competition, or else to state that he does not remember.

What I want is, in other words, is the fact.

Trial Examiner Hornor: The objection will be overruled. Your question refers to a paper there that will not show in the record at all as to what it means, at a later time, and when one comes to review the record, it will be meaningless.

By Mr. Hier:

Q. I will ask you this question, then—

A. Yes.

Q. Mr. Buhrer, there have been a number of price changes in the last three and a half years, both by the Corn Products Refining Company and the Corn Products Sales Company.

A. That is right.

Q. Is that correct?

A. Yes.

Q. Can you remember the reason for any particular price change occurring during that time?

A. Well, the only one I can remember would be the last one.

Q. You cannot remember others?

A. I initiated that myself because there was too  
705 little profit.

Q. You then cannot, at this time, remember why the price was either increased or decreased, except the last one?

A. Well, I cannot, sitting here, now, and looking at this. (The witness indicates a sheet of paper upon which there are certain figures.)

Q. Let me ask you this: is there anything in your company records, or other records of either respondent, from which you can refresh your recollection, and give us the reason why your company changed the price either upward or downward, since June 19, 1936?

A. Well, I presume that if I were to go back to the office and sit down and study through every one of our price declines, and advances, I might pick out one or two that I would recall, but I have no record in my office with any reason—it would take some study, and I would have to see what our profits were at the time, and it might be somewhat in the nature of guesswork.

Q. You could not possibly pick up from more than one or two, or possibly three?

A. Well—

Q. But not any more?

A. Well, three or four, maybe.

Q. At any rate, there would be no substantial number?

A. No.

706 Q. There are no other executives of the company that would know that, that you know of?

A. No, except that Mr. Mueller has the record of price declines and advances, but I do not think there is any reason given.

Q. Then there is really no one else in the company that you know of who could tell us that?

A. Only except as I have stated.

Q. Now, then, when the price is changed, Mr. Buhrer, how do your companies give notice of that to the trade?

A. Through our offices and brokers.

Q. Now, let me clear this up just a moment. The changes are determined upon in New York and the branch offices and the brokers are notified by New York and they, in turn, notify your customers?

A. Yes.

Q. When you determine an increase in price, how many days are allowed after the notice is given before the price increase, or before the price increase becomes effective?

A. Well, we have given as much as from five to ten days to permit the trade to book at the price prevailing before the advance.

Q. Nothing ever more than ten days, in your recollection, since June, 19—June 19, 1936?

A. At the moment, I cannot recall.



707 Q. Now, then, this is what the trade knows as the "booking privilege"?

A. Yes, sir.

Q. This privilege is the privilege of entering an order of something—

A. I beg your pardon?

Q. That is the privilege of entering an order or something of the sort, at a low price, the low price?

A. Yes.

Q. That is usually at the lower price?

A. Yes, it is at the lower price.

Q. Now, when you decline the price, how do you give notice of that?

A. Same way.

Q. Same way?

A. Yes.

Q. When does the decline become effective?

A. Immediately.

Q. Do you guarantee against decline, against—

A. Yes?

Q. Do you guarantee against decline as against the date of shipment or date of arrival?

A. Date of arrival, I think.

Q. Date of arrival in the customer's plant?

A. I do not understand.

708 Q. Date of arrival at the customer's plant?

A. I think it is the date of arrival, but again I will say that Mr. Mueller is better qualified to answer these questions than I am. He is in daily contact with this procedure.

Q. Now, then, Mr. Buhrer, when a customer books an order with one of your branches, branch offices, say a car or two cars, or whatever, it is, of glucose, what does the customer send in?

A. Well, he either gives the order verbally or by telephone, or maybe by wire to our branch office; the branch office relays the order to us.

Q. Or to your brokers?

A. Yes.

Q. Now, then, the practice really amounts to an option on glucose at that figure?

A. I would say it does, yes.

Q. The transaction does not become a sale until the invoice is rendered, the car arrives, and payment is made?

A. Well, it is a moral obligation.

Q. Moral obligation?

A. Yes, sir, that is what I would call it.

Q. On whose part?

A. On the part of—probably a legal obligation on our part, and a moral obligation on the part of the buyer.

709 I would like to amplify that if I could.

Q. Do so.

A. Even if it were a legal contract, we could not enforce shipment.

Q. In other words, if they do not want to take the car, they do not take it?

A. Yes. If they do not want to take the car, we would have to sue them, which we would not do because we would never get another car from them.

Q. Well, that is a good idea. Have you ever sued a customer on such a transaction?

A. If we have; I do not recall it, unless he was finished.

Q. Then, as a matter of fact, then the price that you get for the bulk glucose is never finally determined until the customer gets a car; is that right, because of the guarantee in decline?

A. I would not want to say. Mr. Mueller could tell you better.

Q. When must a customer take this glucose?

A. Thirty days from the date of the advance.

Q. Thirty days from the date of the advance regardless of bookings?

A. He has from five to ten days to book, and thirty days or twenty days more for the shipment.

Q. Shipment has to be completed within that time in 710 order for him to get that price?

A. Well, if the shipment was delayed, we would not charge him the higher price if it was our fault.

Q. You do not ship after that date?

A. Well, I do not quite get your question.

Q. I mean after the thirty days have expired, you do not ship at that particular price?

A. We would if the delay was due to any fault of ours.

Q. What do you do when the customer does not take the car, neglects or refuses to take it within that time?

A. If he refuses to take the car, then we would not ship him.

Q. I do not make myself clear.

A. I am sorry.

Q. I mean, he wants the car but he does not want it within thirty days.

A. If he asks us for a delay?

Q. For an extension.

A. We would object.

Q. What would you do?

A. Well, if he told us why—

Mr. McCollester: This is the question that counsel has inquired into before; in fact, that has been inquired into heretofore at some considerable extent, and was sub-  
711 ject to objection at that time and was objected to as not being within the scope of the issues.

I now make the same objection.

Trial Examiner Hornor: The objection is overruled. Exception noted.

The Witness: If he gives us a good reason, we would probably delay the shipment.

By Mr. Hier:

Q. How much time would you delay it?

A. There is no established rule on that. It would depend on the circumstances. I do not know how long.

Q. It is pretty much within your judgment and his request?

A. Oh, absolutely.

Q. Now, you take a customer such as we have been talking about here, who has booked within five days at the old price, and the five days have elapsed and the price has gone down ten cents, and twenty days are allowed within which to ship the car:

A. How many days?

Q. Twenty days thereafter within which you can ship the car.

A. Yes?

Q. And the customer wants an extension and you give it to him.

A. Yes?

Q. You do not sell to anyone else after that thirty  
712 days has elapsed at that lower price, do you?

A. We would not be apt to, but we would extend the same privilege to anybody else who has the same reason.

Q. Provided they had already booked?

A. Yes, but it is our experience that the trade books sufficiently to take care of those situations. The situation you refer to, I do not recall as a practical matter.

Q. I do not think there is anything else I want to ask you that Mr. Mueller cannot answer except I do want to ask you this.

A. Yes. Very well.

Q. To your knowledge, have the respondents, since June 19, 1936, in any instance, sold glucose of a higher degree which was billed for and paid for at a price of glucose at a lower degree?

A. That is a question I cannot answer; would you mind repeating it?

Q. To your knowledge, have the respondents, since June 19, 1936, in any instance, sold glucose at a higher degree which was billed for and paid at the price of glucose at a lower degree?

A. I am sorry. That is a question I could not answer.

Q. To your knowledge?

A. No, not to my knowledge.

Q. You do not know anything about that?

713 A. No.

Q. That is all. You are excused.

FRED MUELLER resumed the stand and testified further as follows:

727 Mr. Mueller, I would like to ask you the same question I asked Mr. Buhrer; that is, have the respondents sold any bulk glucose since June 19, 1936, and billed for it and been paid for it at a degree of glucose lower than that which was actually delivered?

A. No.

Q. Perhaps, to make the record clear, I should ask this further question: what I mean is, have your companies sold any forty-three degree glucose for forty-two?

A. No.

Q. No exceptions to that?

A. That is correct.

Q. Mr. Mueller, I believe you heard the testimony of Mr. Buhrer, with reference to price changes.

A. I did.

Q. Are you able to remember the reasons for a given price change in the past three and one half years beyond one or two, or three recent instances?

728 A. Well, the principal reason of advance is due to corn advancing in price.

Q. I understand you, but perhaps you don't understand me. I mean as to why Corn Products Sales Company and the Corn Products Refining Company advanced the price on a given date or declined the price on a given date in the past three and one half years—you do not now recall; is that right?

Mr. Hall: Any reasons why it was done on a particular date?

Mr. Hier: Yes.

The Witness: Not on any particular date, no.

By Mr. Hier:

Q. That is what I mean.

A. No.

Mr. Hall: Off the record, please, Mr. Examiner.

Trial Examiner Hornor: Off the record.

(There was a discussion off the record.)

Trial Examiner Hornor: On the record.

By Mr. Hier:

Q. Mr. Mueller, do you have any records in your office or over at the respondents' offices from which you could tell us the specific reason why the respondents advanced or declined the price of bulk glucose on any given date as to that particular advance or decline?

729 A. Other than manufacturing cost, I have no record.

Q. Let me ask you this: you recall some years ago when your companies' dropped—or at any rate, the price of your companies' products fell fifty-five cents during June of 1937—fifty-five cents per hundredweight for glucose.

Do you recall that instance?

A. Yes.

Q. Just using that instance as an example, can you, from your recollection or from any record in your office tell us what led you to do that; namely, decline that price fifty-five cents per hundredweight?

A. I believe that was to follow one of our competitor's reductions.

Q. You believe it?

A. Yes.

Mr. Hall: You mean by that, that is the best of your recollection?

The Witness: Yes, that is the best of my recollection.

By Mr. Hier:

Q. That, I believe, is the widest price change by your company in the past three or three and one-half years, to my recollection as well as yours; is it not?

A. Yes.



Q. Picking out any other change that has taken place, take a change such as in April, 1937, I believe the price was advanced thirty-five cents a hundred-weight. Do you recall why it was advanced or can you, from any records in your office, determine that?

A. I do not recall that, but as I mentioned before, I think it was due to the advance in corn.

Q. To summarize, Mr. Mueller, as to any given price change which has taken place since June 19, 1936, neither from your recollection nor from anything in your office could you possibly state to us the specific reasons for that particular change; isn't that right?

A. No, I could not.

Q. You have a general idea it was due to one, or two, or three, or four, maybe five, factors but which factor or combination of factors you cannot recall now?

A. That's right.

Q. You heard Mr. Buhrer's testimony about these bookings, Mr. Mueller. Bookings in Chicago are handled by your Chicago sales manager, are they not?

A. Everything is handled through our New York office. Chicago sales are exactly the same as sales offices that we have in other cities.

Q. Perhaps I had better ask this question: if a customer in Chicago is notified that your company will increase the price of glucose ten cents, effective five days from the date you receive that notice—that is, from the date the customer receives the notice—meaning, in other words, that he has five days within which after receipt of that notice, to replace that order for glucose at the old price without the increase.

When he places that order, or calls up to do so, he places it with your sales manager or branch office in Chicago, does he not?

A. That's right.

Q. Supposing he calls up six days afterwards. Do you place the order or not?

Mr. McCollester: May it be understood I have an objection to this line of questioning?

Trial Examiner Hornor: Yes. The objection is overruled. The exception is noted.

The Witness: As a rule, our offices cover their trade within a five day period.

By Mr. Hier:

Q. What instructions does your Chicago manager, for instance, have about requiring bookings to be made within the time set?

A. He gets instructions from us that the price will be advanced and that we will accept orders within five days at the price prior to the advance, and for shipment within thirty days after the announcement.

Q. Does he get specific instructions from you that 732 he must not, under any circumstances, back book or enter an order at the old price after the five days have expired?

A. He gets instructions how to book, but we do not give instructions as to what he should do, tell him what not to do.

Q. Have instances of that occurred?

A. I do not know.

Q. How far will you let a customer book ahead in the way of the number of tank cars?

A. Normal requirements.

Q. Whose judgment is it that says this is or is not normal requirement?

A. We judge that in New York.

Q. You judge that in New York?

A. Correct.

Q. That is based on what?

A. On what he previously received from us.

Q. From you?

A. Correct.

Q. It is not based, then, on what he uses annually. It is based on what he has previously purchased from you at times?

A. That's right.

Q. To take a specific customer, if you were to increase the price of glucose today, and there were five days 733 within which customers of that glucose or the prospective purchasers of that glucose could book at yesterday's price, how many cars, for instance, would you permit E. J. Brock and Sons to book, just to take them for an example.

A. I would welcome an order from Brock; and if Brock wanted to book fifteen tanks, I would take it.

Q. That means, then, your estimate is that Brock's normal requirements from you in the past have been fifteen or twenty tanks for a thirty-day shipment?

A. When I said normal requirement from us, I should have said their requirements, whether from us or from our competitors.

Q. So then, it is based on how much glucose they use from all sources?

A. Their consumption, yes.

Q. You will look up to the amount that will completely satisfy their operating requirements for an entire thirty-day period?

A. That's right.

Q. To make it still clearer, if, in your judgment, E. J. Brock and Sons can use forty cars a month, you will, for shipment within a month, allow him to book or to make an option on forty cars; is that right?

A. That depends upon market conditions. If we had a run-away corn market, such as we have had in the past, we would not accept an order of that kind.

734 Mr. Layton: That is top.

The Witness: We would not accept an order for that quantity.

By Mr. Hier:

Q. That is the maximum under any conditions that you would accept; is that right?

A. That is about right.

Q. You would not allow him to book more than he can normally use, or you think he would use from all sources, within thirty days?

A. That's right.

Q. When you get a, what you call "run-away corn market,"—you mean by that, translated into the price of glucose that that is a time when the price of glucose is going up either sharply or with rapid, small increases?

Mr. Hall: Glucose or corn, do you mean?

Mr. Hier: Glucose, I mean.

The Witness: I wish you would repeat that.

Trial Examiner Hornor: Will you please read the question, Mr. Reporter?

(The question referred to was read by the reporter.)

By Mr. Hier:

Q. Series of rapid, small increases.

A. That is correct.

Q. Then, under those circumstances, how much  
735 would you allow this particular customer, for example?

A. It depends all on conditions at such a time.

Q. Those conditions are what—that is what I am trying to find out.

A. Depends on what the conditions of the corn market are. There are times in the past when corn went up the full limit and we could not get any corn. So, naturally, to protect ourselves, we cannot make any bookings.

Q. In other words, when there is a run-away market in corn, which is of course reflected in glucose, that has the effect of diminishing the amount you will allow any customer to book?

A. Yes.

Q. At an old price?

A. Yes.

Q. When notice of these prices—

A. Pardon?

Q. When notices of these price advances go out, are they sent uniformly to all customers?

A. Yes.

Q. How far back do you go on past transactions to determine whether a glucose user is a customer and entitled to the notice?

A. There is no particular time.

Q. Now, when you say, Mr. Mueller, that you sent out notices of price advances uniformly, just explain in 736 your own words what you mean by that.

A. We sent the notice of the advance to every buyer or prospective buyer of our products.

By Mr. McCollester:

Q. That you knew about?

A. Yes, sir, that we knew about.

By Mr. Hier:

Q. Well, what do you say about it?

A. Well, to every prospective buyer that we know of.

Q. Well, then, there is no differentiation made as to whether the prospective buyer or customer buys in tank car lots or five gallon cans, or a ten gallon can, or whether he buys one hundred pounds a year or a million pounds a year?

A. Yes.

Q. That is right.

A. That is right.

Q. Now, you referred, I believe, to the year 1937 when, I believe, glucose sold for \$3.59. Do you recall that period of time?

A. Yes.

Q. Now then, as I recall it, the price advanced from \$3.04, ten cents, and then went up thirty-five cents, and then went up five cents, reaching, finally, \$3.59; do you recall that?

737 A. Yes.

Q. At that time, what was the respondents' practice about allowing advance bookings? Was it the same as you have testified about; namely, normal requirements for thirty days?

A. Yes.

Q. It was not greater than that?

A. We may have sold some for more than what they would require within a thirty day period; that is a little more than their consumption.

Q. So, would you say there were instances when you billed them or—I will put it this way—would you say there were instances when you did not pursue the same policy?

A. I do not quite follow you.

Q. Would you say there were instances when your policy, about which you have testified, was varied in booking larger quantities than what you regarded their requirements to be; is that right?

A. Yes.

Q. Now, do you recall any other instances of that character?

A. You are taking that time as one such instant?

Q. That is what I thought you understood my question to be. In order that the record may be perfectly clear, I will repeat it.

Would you say that was one instance when your policy about which you have testified was varied; that is, in permitting larger bookings than what you regarded their requirements to be?

A. Oh, yes.

Q. I now ask you, do you recall any other instances of that character?

A. No, I do not.

Q. Well, do you recall instances where the price of glucose in the summer of 1936, for instance, advanced progressively from \$2.44 per hundredweight to \$3.44 per hundredweight, and remained about \$3.44 for some seven or eight months, at or about \$3.44 per hundredweight?

A. I know about that time we did have a number of advances.



Q. When your prices started upward from \$2.44, did your company continue its practice of requiring the bookings limited to the thirty-day total requirements of the customer?

A. I do not remember.

Q. You do not recall?

A. No, I do not.

Q. Then that might have been another instance when you permitted heavier bookings; might it not?

A. It is possible.

By Mr. Layton:

Q. At those times, the two instances when you had that situation, as has just been indicated in the questions; at 739 that time, was it not your policy to restrict or at least not to actively solicit advance bookings from everybody, in the manner in which you have just testified?

A. I do not remember. It is quite a ways back, that is four years.

Q. I am referring to the two instances when you had that run-away market.

A. I do not remember.

Q. Would that be your general policy in a situation of that character?

A. It all depends on what the situation was at that particular time.

Mr. Hall: Off the record.

Trial Examiner Hornor: Off the record.

(There was a discussion off the record.)

Trial Examiner Hornor: Proceed.

By Mr. Hier:

Q. Now, Mr. Mueller, Mr. Buhner was a little uncertain about guarantees against price decline.

A. Yes.

Q. Is the price to a customer guaranteed against market decline as of the date of shipment from the respondents' plants, or as of the date of arrival in the customer's plant?

A. On the date of arrival.

740 Q. So then, Mr. Mueller, the price which the customer paid for any given quantity of glucose, is never officially determined or determinable until he gets the glucose; is that correct?

A. If you are figuring on the low price, the answer is yes.

Q. That is what I mean; that is the price?

A. Yes.

Q. And you do not know—

Mr. Hall (interposing): It cannot be the same as the contract?

The Witness: It would not be more than the invoice price, while it could be lower than the contract or invoice price.

Trial Examiner Hornor: Read the answer back to the witness, and let us be sure that is his answer.

(The answer referred to was read by the reporter.)

The Witness: That is right.

Mr. Hall: Off the record, please.

Trial Examiner Hornor: Off the record.

(There was a discussion off the record.)

Trial Examiner Hornor: Proceed.

By Mr. Hier:

Q. Is the invoice made out at the time of shipment?

A. Yes.

Q. It is not made out before that?

741 A. No.

Q. If there is any change then the invoice price governs?

A. No, the buyer deducts the difference between the invoice price and the price on the date of arrival.

Q. Very few of these customers, especially the large customers, Mr. Mueller, order in any other manner than simply picking up the telephone or giving a verbal order to the salesman?

A. Yes, sir. That is the way it is usually done.

Q. It is very rare, if at all, that your larger customers would send in a specific order at all, written out?

A. That is right.

Q. So that all your company has at the time of booking, is made, is a notation that Curtis, or somebody else, wants ten cars at \$2.09, or whatever the price happens to be?

A. Yes. That is all we have from the buyer.

Q. Now, then, Mr. Mueller, you are not, I take it, familiar with the details of any bookings, or prices, or activities, or practices as to particular customers or as to particular sales in Chicago, Illinois?

A. No.

Q. Your Chicago sales manager, Mr. Cull, would be familiar with this, if anyone is?

A. Yes, but we in New York are familiar with it, too.

Q. I mean, I do not want to take time here asking  
742 you about these particular shipments that perhaps go  
beyond a thirty day period, or any particular orders  
which were made after five days.

A. Mr. Schmitt will know. He handles the details of  
these orders. He is sitting right here, under subpoena, to  
testify as a witness.

Q. I want to go back, Mr. Mueller, and illustrate this  
guarantee against price decline.

A. Yes.

Q. For the benefit of the record here.

A. Yes.

Q. If you have two customers in the same town and we  
will call one of them, "A" and the other one "B", and we  
will say that on July 1, of any given year, your market price  
for glucose is \$2.09 and on that day, customer "A" orders  
a car of glucose at \$2.09, and then on July 15, the price is  
advanced to \$2.29 and on that day, customer "B" orders  
a car at \$2.29.

Those cars are not; that is, either one of them received  
at the customer's plant until, we will say, July 30, in which  
time or by which time the price has come down or declined  
to \$2.19.

The net effect, under your policy of guarantee against  
price decline is that when customer "B" gets his glucose,  
it is at \$2.19 and the other customer, "A", gets his  
743 glucose at \$2.09 on the same day; is that right?

A. That is correct, I think, but your question is  
quite complicated, I would like to hear it again.

Q. It sounds complicated, but I do not believe you will  
find it to be so.

Trial Examiner Hornor: Read the question again.

(The question referred to was read by the reporter.)

The Witness: That is right.

Mr. Hier: That is all.

Is there any cross examination?

Mr. Hall: I do not think I have any questions. I do not  
think it is important to explain why those prices went up on  
those particular dates or went down.

Mr. McCollester: I should like to hear that long question  
read again.

Trial Examiner Hornor: Read the question again.

(The question referred to was again read by the reporter.)

Mr. Hall: I will ask these questions.

*Cross Examination by Mr. Hall.*

Q. In the question just asked, didn't customer "B" have five days in which to book at the price of \$2.09 before it was actually in effect at \$2.19?

A. Yes.

744 Mr. Hall: That is all.

*Redirect Examination by Mr. Hier.*

Q. Mr. Mueller, assuming that there is no question of five days' booking, but that these orders, as given to you, were entered at the time that the prices given in the question were in effect, your answer would still be the same?

A. That is right.

By Mr. Layton:

Q. And the day as to which you finally, and ultimately, and irrevocably knew what the price was going to be, would be and was on the date of shipment, and on that date the price was different for each customer?

A. That is right, but as Mr. Hall pointed out; this buyer, "B" had the privilege of placing the order at the time "A" purchased.

Mr. Layton: That is all.

Mr. Hier: That is all.

*Recross Examination by Mr. McCollister.*

Q. But had the price, by July 30, gone down again to \$1.99, both would have paid only \$1.99?

A. That is right.

753 Wednesday October 9, 1940 at 10:00 a.m.

ALBERT CULL was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

754 Direct Examination by Mr. Hier.

Q. Will you state your full name, please?

A. Albert Cull.

Q. How do you spell the last name?

A. C-u-l-l.

Q. Where do you reside?

A. 7144 Jeffrey Avenue is the residence address; business address, 333 North Michigan Avenue.

Q. Mr. Cull, what position do you hold with the Corn Products Sales Company?

A. I am manager of Chicago sales.

Q. What territory is directly under your office?

A. The territory in Chicago, most of Illinois, most of Wisconsin, most of Iowa, a part of northern Michigan and a part of northern Wisconsin, that is, a small part of northern Wisconsin.

Q. All sales in the northern area are made directly under your supervision, are they?

A. They are made under my supervision, subject to confirmation by the headquarter office.

Q. In any event, Mr. Cull, you have records and you are familiar with those sales, are you?

A. I should be, yes.

Q. Mr. Cull, I would like for you to tell us just how 755 orders are entered in the Chicago office by the Corn Products Sales Company.

A. You mean ordinarily, or in case the market changes, or how?

Q. Ordinarily.

A. Ordinarily an order comes to us through the salesman, or by some other means, and it is entered on the books.

If we have a market change like in corn syrup, for instance, we have an extra booking period of five days, and that five days added on the 25 days makes 30 days in all for the purpose of taking care of the shipment. Assuming that the expiration day was on September 9th and we had a change, we would have up to September 14th, unless there was a Sunday, on which to take care of the booking.

Q. Referring only to glucose, Mr. Cull, as I understand it, if you advanced your price on glucose on the first of the



month, you will accept orders at the price as of the date before the advance, or until the 6th?

A. In the five day period.

Q. You do not accept any orders at the old price after the five days have expired?

A. I will qualify that by saying that we do not accept any orders; that all we do is to take the orders and refer them to our headquarter office for acceptance. We have no authority here in Chicago for the acceptance of business.

756 Q. I see.

A. In other words, it is taken subject to price sheets and subject to confirmation by the headquarter office.

Q. When the order is confirmed by the headquarter office does it come back to you?

A. It comes back to us with a copy for the customer.

Q. When orders are confirmed or changed by the headquarter office they come back to you?

A. Yes, they come back to us, as I say, with a copy for the customer.

Q. And do you know whether they are confirmed or changed?

A. Yes, sir.

Q. Let me ask you this: are orders accepted either here or in New York at the old price after the five days have expired?

A. I always say that if such a thing occurred it would be rather exceptional. Perhaps I can give you our routine in order to answer that question for you.

We cover all customers who are on our books by our sales force and also by other means such as by telephone or letter, if salesmen are not available, and those customers are considered and protected for their normal requirements.

Now, to answer your question specifically, Mr. Hier, if an exceptional situation ever occurred after the fifth day and someone had not fully protected themselves, if they 757 represented to us that our competitors had them protected, or would protect them, why, I would be inclined to refer that case to Fred Miller at the New York office. He takes care of that. We would not do that at Chicago.

Q. Do you recall any instance in the last three and one-half years where that has been done?

A. I would like to qualify that with reference to three and one-half years by saying that although I have been with

the company for 31 years my activity has been in the packaging end of our business, up to April 1st, 1936, at which time I was put in charge of all sales; but from April 1st, 1936, up to the end of 1938, probably around the 1st of December, we had a man who was in charge of the bulk end of the business, and I paid very little attention to the bulk business in that time.

Q. Who was the man you are referring to?

A. That man was C. H. Kirkland. He was retired because of sickness. I understand that he went to Mexico and the last I heard from him he was still in Mexico.

At the end of 1938 I took over the matter of that detail, so I don't know as I can say that I am fully conversant with all of the details of the situation up to that time.

Q. So that we understand, Mr. Cull, can you tell us any instance you know of where bookings were accepted 758 after the five day period had elapsed?

A. After the five day period had elapsed?

Q. Yes.

Mr. McCollester: To preserve the record, Mr. Examiner, may the record show my objection to any questions on that subject of delayed bookings as not being within the scope of the issues in this case?

Trial Examiner Hornor: Yes. The objection will be overruled. The exception may be noted.

The Witness: I cannot say that I recall at this time any, Mr. Hier. There might have been an order here and there but I have not any definite knowledge of any.

By Mr. Hier:

Q. So you would say it was rather exceptional?

A. I would say it was a rather exceptional situation and it would only be one in order to meet a competitive situation which was brought upon us. I am sorry but I cannot recall any particular cases.

Q. With reference to the shipping period, which you say is 25 days after expiration—

A. It is 30 days in all.

Q. Or 30 days from the date of the price advance, Mr. Cull, has that been exceeded by any of your customers to your knowledge?

A. It has been exceeded here and there to a small 759 extent due to a matter of competitive conditions, or something of that kind. Of course, I have nothing to

do with that. That would probably be a matter of factory handling. I don't know of any particular delays along that line, except—

Q. Do you recall—pardon me. Go ahead with your statement.

A. (Continuing.) —except perhaps we may have exceeded the time in the case of Curtis.

Q. Do you recall any instances where the time was exceeded as much as 60 days, Mr. Cull, in the Chicago area?

A. 60 days?

Q. Yes, after the 30 days had expired.

A. The only one I would have in mind would be this account which I just spoke about, and I remember on a couple of occasions of shutting off this account on the expiration date and suffering a loss of business. We were told that it was necessary, that the original loss of business was because others carried them along, so we found it was necessary to protect the business that way, by making a little longer delays.

Q. You say you were told that. Were you told that personally?

A. I wasn't told that personally, no.

Mr. Hier: Just to keep the record straight, Mr. Examiner, I move that the remark about him being told go out.

760 Mr. McCollester: I think the same is true of all his testimony, so far as that goes. He is testifying rather from general information now rather than specific transactions.

By Mr. Hier:

Q. Mr. Cull, do you have anything to do with the determination of a price advance or the determination of a price decline?

A. No, not in any way.

Q. You have nothing to do with that?

A. No. That is handled entirely at New York.

Q. Do you make any recommendation along that line?

A. I cannot say that I make any recommendations. Naturally, if I was in a competitive situation it would be my duty to report the matter to the officials at New York and then leave it to their judgment, as to whether the price should be changed or not; but I would not say that what I do would be looked upon as a recommendation because I would not have that authority.

Q. Mr. Cull, when an order is entered or booked, or when bookings occur within five days after a price advance what record is made here by you in your office?

A. The orders are written up by the person on the order desk and they are written on what is known as the regular order form. I cannot tell you the actual mechanics of 761 the operation, but a certain number of copies are sent to the New York office for their acceptance or rejection.

Q. You don't recall the form number—

A. I am sorry, but I do not.

Q. (Continuing.) —of such confirmation, or, anything of that sort?

A. If you will show me one of the forms I will be glad to identify it.

Mr. Hier: Let me see if I can find one of those.

Mr. Layton: While you are looking for that I will ask him a question.

Mr. Hier: All right.

By Mr. Layton:

Q. With reference to tank wagon shipments, Mr. Cull, does the same procedure occur with reference to sending the orders to the New York office for confirmation?

A. No, in connection with tank wagon shipments we place the order on our books, but we continue on with the tank wagon after the expiration of the thirty day period. In other words, it would be impossible for us to enter any advance orders on that. The best we can do, if a buyer says that he needs so many loads, is to put it on the books, but specifications come in on those at the time.

Mr. McColester: I do not think you understood the question. It was whether the same mechanics were 762 followed in forwarding the order to New York in connection with tank wagon orders.

The Witness: The tank wagon order is placed at Chicago and is referred to New York. New York has always had definite knowledge as to our movements. That is to say, with an order received today we would have to await the New York confirmation of it before we could make delivery.

By Mr. Layton:

Q. Not having any reference in my next question with any reference to booking, Mr. Cull, what is the typical way of doing business with tank wagon purchasers in the Chicago area, without any reference to price decline?

A. I don't understand that question. I am sorry.

Q. Do your salesmen call upon them from day to day or do you telephone them?

A. No, we have two methods, that of salesman contact, and then also by a follow-up from our office and warehouse, which is the usual procedure in tank wagon deliveries.

Mr. Layton: I think that is all I want to ask.

Mr. Hier: Would you mark this, please, Commission's Exhibit No. 118, for identification?

(The document referred to was marked "Commission's Exhibit No. 118," for identification.)

Mr. Layton: Oh, just one more question.

By Mr. Layton:

763 Q. If a tank wagon purchaser telephoned today and said that he wanted a tank delivered today would you deliver it to him today?

A. Yes, the same as with a man who wanted a drum of glucose at a warehouse. Of course, that would be done in accordance with the rules laid down by our office with reference to the price. We could not assume that the price was so much today. We could not take the order at a price less than that. It would have to be the price that was set down by our headquarters office, and we must live up to it. We have no authority to change the terms.

Mr. Layton: All right.

By Mr. Hier:

Q. Mr. Cull, here is a document which has been marked for identification purposes as Commission's Exhibit No. 118. I wish you would look at that and tell me if that is what you refer to as being made up in the sales office after the booking is made, and whether that is what is sent from the customer? (Passing document to the witness.)

A. This is dated September 25th, 1936. As I explained before, that was during the time when I did not have charge of the details of the organization, of that part of the organization; but I would say, without being able to check up on it right now, that this looks like the kind of a form that 764 was probably used.

Q. That is not what you are currently using?

A. I think it is, but I cannot go on record and say it is, without making a comparison.

Q. Do I understand the procedure to be that you send out one of the documents such as the one that is identified here as Commission's Exhibit No. 118, for identification, on every sale that you make?



A. Just on the carloads.

Q. Only on carloads?

A. Yes. We submit to our headquarter office in the five-day period what we call our l.c.l. booking list. That is the detail that they are expected to use; but I am saying, although perhaps I am wrong, I am saying that there is no confirmation that goes out on the smaller customers. Perhaps there is. I really don't know.

Q. Confining my question to carload buyers only, Mr. Cull, I wish to inquire whether a confirmation, if that is what you call it, similar in form to what has been identified as Commission's Exhibit No. 118, for identification, goes out on all carload sales or merely on bookings?

A. On bookings.

Q. On bookings only?

A. I will have to qualify my statement again by saying in answer to that question "Yes," that I am not in position to say so because we do not send them out from our office. That is also a headquarter matter. I would say, as far as I am informed, that that is the case. That, of course, cannot be definitely answered.

Q. You tell me, then, that this document which is referred to here for identification purposes only as Commission's Exhibit No. 118 is not sent out from the Chicago office?

A. No, not from the Chicago office.

Q. Do you have a copy of it?

A. Yes, we have a copy of it.

Q. This is sent to the customer from the New York office, is it?

A. That is not the form we sent to New York. We send a different form, one which is made up from that. I am quite sure that a copy of that comes to us for our record.

Q. This copy is made in New York?

A. Yes, sir.

Q. When is the date put on there? When it is made out?

Mr. McCollester: If he knows.

The Witness: I cannot say because I have nothing to do with it; but I would assume, if an assumption is permitted, that the date would be put on at the time the order is given.

Mr. McCollester: I do not think we want any assumptions in the record. I move that it be stricken out.

766 Mr. Hier: That is all right.

Trial Examiner Hornor: Motion granted.

By Mr. Hier:

Q. Now, so far as your recollection goes, Mr. Cull, it is that confirmations are sent to all customers who book for one tank car or more during the booking period?

A. Yes, sir.

Q. And those are made up in the New York office pursuant to something that you send to the New York office, is that right.

A. Yes, sir.

Q. What is it that you send to the New York office?

A. We would send a form that is—perhaps I am not clear on this, but I believe we send a red form to New York. I am quite sure we do not send this.

Q. I thought you just testified that that was made up in New York and then sent to the customer?

A. Yes, but I don't know whether we make out any copies of this or not. I am quite sure we don't; but I could find out from my office if you will allow me to do that.

Q. We will cover that point, perhaps, later.

A. All right.

Q. When you have a booking, Mr. Cull, what record do you make in your office of that booking?

Mr. McClester: You are referring to tank car 767. bookings now, are you?

Mr. Hier: Yes, tank car bookings.

The Witness: We would enter—or we would make up this sheet, which the office makes up, and that would serve as our file copy. Then that remains in our file until applications are made against it, or as applications are made against it. Of course, it appears in our shipping record.

By Mr. Hier:

Q. Do you have in your office a list of the bookings for every given day?

A. Oh, yes, we should have.

Q. Here in Chicago?

A. Yes, sir.

Q. These bookings, Mr. Cull, are merely options on the part of purchasers, are they not?

A. Well, we don't like to say so, but perhaps they are. Naturally, when the price changes a customer may be inclined to be liberal in entering his order so as to make sure that he is getting the volume he needs. Take this particular account, for instance. If we had an order for a certain number of tank cars, why, I would imagine that pretty

nearly all the other members of the industry would do the same thing; but we made it a practice, at least since my handling of the thing, not to enter contracts arbitrarily.

We have to have a basis for putting it down, and the 768 basis is the customer. We have to at least tell the customer that the booking is to be made.

Q. That is the way you tell him, is it not, by that sheet there (indicating)?

A. No. It would be in person.

Q. You tell him in person?

A. That is, we should tell him in person. My salesmen are instructed not to put anything on the books that has not been discussed with the customer.

Q. Has that been your recent policy?

A. I am saying since the end of 1938. I do not think it is the recent policy. Really, I am not in a position to say because I don't know how Mr. Kirkland handles his work; but I do know that that has been my definite practice for thirty-one years, on all business I have to deal with in connection with the packages, and since the end of 1938 on the bulk.

Q. When you enter a booking in the Chicago office here, you have nothing from the customer in writing; is that right, Mr. Cull?

A. As a rule, no. Of course, there are exceptions there, too.

Q. Do you know of any instance, Mr. Cull, where a booking or where bookings have been dated back to take advantage of a lower price?

Mr. McCollester: I would like to make an objection 769 to that question, Mr. Examiner.

Trial Examiner Hornor: The objection will be overruled, and an exception may be noted.

The Witness: Would you mean after the thirty-day period had expired, or anything of that kind?

Or suppose a case. We will assume that a customer in the five-day period calls up and says, "We gave you an order for a couple of tanks and now we find that we need another couple of tanks."

I dare say in a case of that kind we may put it on the books.

By Mr. Hier:

Q. Perhaps I had better assume a set of circumstances, Mr. Cull, then you can answer.

• If the price of glucose is advanced by your company on September 1st 10 cents then the customer, as I understand it, under the company's rules has a right to book at the old and lower price until September 6th.

Now, then, do you know of any instance where your company has entered a booking that has occurred after September 6th at the old price?

A. That might be such a case, although I haven't anything in mind just now. If that were done it would be because some competitor has offered them the same proposition.

Q. But you cannot say definitely from your own 770 knowledge whether that has or has not been done?

A. I cannot recall any such instances. I will say that occasionally it has been done, but not to any extent.

By Trial Examiner Hornor:

Q. The question is, Mr. Witness, has it been done?

A. I beg your pardon.

Q. The question is has that been done?

A. I would say that it might—

Q. It is not a question of "might." Has it been done?

A. Yes, it has been done but I just cannot recall any cases right now. That is, I want to qualify that by saying that it has been done within a reasonable period of time. There have not been any such cases of undue lapse of time, but in cases where there was some justification for it.

Does that answer your question, Mr. Hier?

Mr. Hier: So far as it can, yes.

The Witness: All right.

By Mr. Hier:

Q. Now, I want to ask you this question: Do you know of any cases where your sales are—I understand that you are not using brokers in the Chicago area.

A. We use brokers in some part of our Chicago territory.

Q. But not here?

A. But not in the city of Chicago.

Q. All right. Do you know of any instances since 771 you have been manager of the local office here where your salesmen have either accepted or entered orders after the booking period has expired, either at the insistence of the customer or upon his own volition?

A. Well, salesmen, of course, would have no authority to accept any orders any more than we would here in Chicago.

Q. Would he have any authority to put it on the books?

A. No; and I would not have any such authority.

Q. I mean subject to confirmation from New York.

A. You mean subject to sending it to New York?

Q. Yes.

A. No, he would have no authority to do that. It would be reported—it might not—what I am trying to say is it might be handled by our order desk and then sent down to New York.

Q. Your answer is, then, so far as you know that has not been done; is that correct?

A. No, that wasn't my answer. My answer was—do you want to permit me to say that—

Trial Examiner Hornor: Just answer the question.

Mr. McCollester: Does the witness recall what the question was?

Trial Examiner Hornor: Read the question to the witness, please, Mr. Reporter.

772 (The question above referred to was read by the reporter.)

Trial Examiner Hornor: Answer yes or no.

The Witness: May I have the question that was asked before that last one, please?

Mr. Hier: I will rephrase it. Perhaps I can do that better than having the reporter go back and trying to find it.

By Mr. Hier:

Q. The substance of the question I asked you was this: whether from your own knowledge you know whether any salesman here in the Chicago area, of your company, has entered an order or accepted an order after the booking period has expired?

A. No, no salesman has authority to enter an order. No salesman has any authority to enter an order.

Q. Well, he may not have authority, but the question is, Mr. Cull—

A. The salesman—

Trial Examiner Hornor: Just a minute. Mr. Reporter, just read the question to the witness.

(The question above referred to was read by the reporter.)

Trial Examiner Hornor: Now, answer that yes or no, please.



Mr. McCollester: It is a matter of your own knowledge.

The Witness: That is, a salesman or myself?

Mr. McCollester: No. Do you know, is the question.

Trial Examiner Hornor: Read the question again to the witness, Mr. Reporter.

(The question above referred to was re-read by the reporter.)

The Witness: I would say to my knowledge no. It refers to salesmen.

By Mr. Hier:

Q. Now, Mr. Cull, you mentioned a while ago the fact that you allow your customers to book within this five day period up to their requirements for bulk glucose. How is that determined and by whom, Mr. Cull, as to what their requirements are?

A. Why, it would be determined by the customer and, of course, probably with a suggestion on our part as to the volume he would use during a certain period, in accordance with our statistical records.

Q. Your statistical records would show, not what he uses and nothing he gets from all suppliers, but they would show what he has bought from you?

A. We wouldn't be able to tell what he bought from our suppliers. Naturally, we have what he bought from us.

774 Q. So the amount of the booking is based, from your standpoint, upon what he has in the past taken from you—

A. No.

Q. —within the 30 day period; is that right?

A. No, not necessarily.

Q. What is it?

A. We, naturally, have some knowledge, although it might not be accurate knowledge, but we have some knowledge of what a man uses.

Q. What is it?

A. For instance, we know what Brach uses. That is, we don't know, but we think we know. We may not be getting their business, but we might at any time get their business, so, therefore, we protect our account by telling the buyer that unless he has some objection we will enter a certain number of tanks.

Q. Upon what is your knowledge of the buyer's requirements based? You made the remark a minute ago that you thought you knew what Brach's monthly requirements were.

A. The only way we know as to what the buyer's requirements are, unless we sold them exclusively, would be from our knowledge of the business, and what others might say about certain accounts.

Q. — It is based upon rumors concerning certain accounts?

A. From talk that you would gather in a general way.

775 Q. What would you say Brach's requirements are?

A. I haven't the slightest idea. I would say somewhere around 300 tanks a year.

Q. Which would be 25 tanks a month?

A. About that.

Q. That is the basis upon which you allow bookings through larger users; is that right?

A. No, we wouldn't enter Brach for 25 tanks for a 25-day period because we haven't been getting their business in that proportion, so we would just use a basis we would think would be a reasonable amount to get, then perhaps hope we might get a little bit more.

Q. How much would you enter Brach for now?

Mr. McCollester: Isn't that a hypothetical question?

Trial Examiner Hornor: Yes.

Mr. McCollester: I wish to make an objection to that, Mr. Examiner.

Trial Examiner Hornor: Objection sustained.

By Mr. Hier:

Q. How much have you entered Brach for in the past?

A. I don't recall that since 1938 of entering them for an amount exceeding five tanks. We might have done it but I don't recall it.

Mr. Hier: All right.

776 The Witness: I know the last amount we put down was for five tanks. I think that is the way it has been running recently.

Mr. Layton: Let me ask the witness a few questions.

By Mr. Layton:

Q. With reference to a customer to whom you were supplying their requirements, Mr. Cull, would you, as a normal policy, permit them to book more than what they had been buying from you in 30 days?

A. I would say, as a general thing, no. Naturally, we do not carry on speculation at our expense; but if a man, due to a slow period, had used one tank, why, naturally, we would not object to him putting down two or three tanks

because we would assume that that man expected to add that number of tanks.

Q. To your knowledge, with reference to a customer to whom you had sold their entire requirements, have you ever permitted them to book a greater number than they had been using normally in a 30 day period preceding that?

A. Yes, sir.

Q. How far would you say that had gone?

A. I would say, as I just explained, that that would largely depend upon the seasonal business, and all of that.

If a man told us to put down five tanks, naturally, we 777 are not going to ask questions about it, we are going to put down five tanks.

Q. Even though he had only used one tank the month previous thereto and you supplied his requirements?

A. Well, from one tank to five, of course, is a big jump. I would say if it looked as though there was a speculative situation there I am quite sure that our headquarter office, as I said before, which accepts all business, would decline it, if it were an unusual amount and there was no basis for it.

Q. To your knowledge since June, 1936, has there ever been an occasion when you permitted a person to book—when you permitted a customer to book what you knew to be four or five months requirements?

A. I would say that to my knowledge since 1938 that has not been done.

Q. My question was since 1936.

A. I am not in a position to answer that. I don't think so, but I do not have any detailed knowledge about that because—

Q. Then your answer is, Mr. Cull, to your knowledge "No."

A. O. K., sir.

Q. Now, prior to 1938—or after 1936 and prior to 1938, Mr. Cull, you still were in charge of sales in the Chicago area, were you not?

778 A. Yes, I had nominal charge. I had a manager, but I had no knowledge of the details. The only information I had from that time to the end of 1938 were such conversations as Mr. Kirkland had with me. I would not go out and examine the books pertaining to the bulk orders, or anything of that kind.

Q. Wouldn't the situation I have just stated been of such an unusual character that Mr. Kirkland would have brought it to your attention?

A. I don't think so.

Q. What?

A. No, he wouldn't, because Mr. Kirkland was operating independently in his end of the business. I was directing my entire attention to the packages, and Mr. Kirkland was directing his entire attention to the bulk. He wouldn't report to me particularly on those matters.

Q. Weren't you his superior?

A. I was from an official standpoint, but I cannot say that I was from a practical standpoint.

Mr. Layton: All right.

By Mr. Hier:

Q. In answer to a question that Mr. Layton asked you, you stated that you did not have any personal recollection prior to 1938. You can, however, inform yourself from your company's records, can't you?

779 A. From the company's records I should be able to.

Q. Now, Mr. Cull, do you recall of any instance where tank cars have been sold—that is, tank cars of glucose have been sold to buyers at a price before an advance, then sold by those buyers back to your company at the advanced price, then subsequently resold by you back to the original buyers at the advanced price?

Mr. McCollester: That is objected to, Mr. Examiner, as being outside the scope of the complaint.

Trial Examiner Hornor: Objection overruled, and an exception may be noted.

The Witness: Well, no, I don't.

By Mr. Hier:

Q. You do not?

A. No, sir. That is, you mean bought from us and sold back to the company?

Q. Yes.

A. No, I don't.

Q. Well, let us take a specific instance. You can pick any purchaser you wish. Take, for instance, Curtiss. I do not mean to infer in that case that it has been done or has not been done. I am merely asking you the question.

Has it ever occurred when the price of glucose has gone up, Mr. Cull, that Curtiss has booked one or more cars from you at the price prior to the advance and subsequently sold those cars back to the company at the advanced price, then your company has sold them back to Curtiss at the advanced price?

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Mr. McCollester: The witness answered that question, saying that he didn't know.

Mr. Hier: I am willing to let his answer stand, only he asked me a question and I am trying to make it specific.

Trial Examiner Hornor: He may answer.

The Witness: I would say in that particular case, no.

Trial Examiner Hornor: That does not refer to Curtiss alone. That refers to anybody.

The Witness: Oh, that don't refer to Curtiss?

Trial Examiner Hornor: No.

The Witness: Then my answer should stand that to my knowledge it has not been done.

By Mr. Hier:

Q. Is it your company's practice, Mr. Cull, to issue invoices for glucose at the end of the thirty-day period when shipment cannot be completed within thirty days?

A. You say is that the company's practice?

Q. Yes.

A. No, sir.

Q. Has it been done?

781 A. I don't know whether I can answer that. Of course, that would also be a matter for Mr. E. W. Schmitt, in New York. He is the one who should answer that. We have nothing to do with the order after it is placed with our New York office.

Q. This office here does not issue the invoices?

A. We don't issue invoices in our department, although we do have an invoicing department in the Chicago office, over which we have no jurisdiction.

Q. That answer of yours leaves me a little bit befuddled.

If you make a sale, Mr. Cull, or take an order for one car of glucose today in Chicago for a Chicago customer, which is entered on the books and sent to New York, which office issues the invoice?

A. That would be issued under instructions of our New York office.

Q. Which office issues it?

A. The invoicing department would draw the invoice—the office in Chicago would draw the invoice, providing it came within the scope of their invoicing activity, upon instructions that are passed out to them through our New York office.

Q. Then the Chicago invoices are written up where?

A. In the New York department.



Q. The Chicago invoices—I mean the invoices for the Chicago customers are written up on the typewriter 782 and put in the mail, or otherwise delivered from the Chicago office; is that right?

A. From another part of our office in Chicago.

Q. The office located at 333 North Michigan Boulevard?

A. Yes, sir.

Q. That department is under New York supervision?

A. Yes. We have nothing at all to do with it.

Q. Back a few pages, Mr. Cull, I asked you a question, if I recall it correctly, whether to your knowledge a salesman had ever entered an order or accepted an order from a customer after the booking period had expired. Your answer to that question, as I recall it, was "If it refers to salesmen, no."

Did you have anybody else in mind to whom it might refer?

A. What I meant by that is that our salesman has no authority to accept an order. If a buyer were to intimate to our salesman that he would want some goods, why, naturally, the salesman would refer it to me and I, in turn, would refer it to our New York office.

Q. In which event it might be entered, or might be accepted, is that right?

A. If our headquarter office told me to enter it I would; but we here would have no authority to say yes or no.

By Mr. Layton:

783 Q. Have you entered them in such a situation upon instructions of the New York office, that is, you personally?

A. Have I personally done it?

Q. Yes, in a situation like we have been discussing.

A. After the thirty-day period?

Q. After the five-day period.

A. After the five-day period?

Mr. McCollester: Wait a minute. Let us understand what we are talking about here.

Mr. Layton: This is the first time thirty days have been mentioned.

The Witness: After the five-day period, as I stated before, we probably would, under exceptional cases.

Trial Examiner Hornor: Just read the question to him again, Mr. Reporter.

(The question above referred to was read by the reporter.)

Mr. McCollester: Mr. Examiner, may I make this observation?

Trial Examiner Hornor: Yes.

Mr. McCollester: When we were in New York we told counsel for the Commission that the matter of the determination of whether orders should be entered or not was within the discretion of the New York office. That was testified to by Mr. Miller. We suggested that Mr. Schmitt 784 was the man who knew the details about that and was prepared to testify with regard to that. Mr. Schmitt was subpoenaed and then excused.

Trial Examiner Hornor: You are asking this man what was done under his supervision?

Mr. Hier: Yes, that is it.

Trial Examiner Hornor: He may answer the question yes or no. Go ahead.

The Witness: May I have the question again, please?

Trial Examiner Hornor: Read the question to the witness, please.

(The question above referred to was read by the reporter.)

The Witness: In exceptional cases we have entered an order here and there after the five day period due to a competitive situation, or something of that kind.

Mr. Hier: That is all.

Trial Examiner Hornor: Gentlemen, we will take a ten minute recess at this time.

(A short recess was taken.)

Trial Examiner Hornor: The hearing will come to order, please.

Mr. Hier: Mr. Reporter, will you mark this Commission's Exhibit No. 119, for identification, please, so 785 I can put it up on the wall?

(The document referred to was marked "Commission's Exhibit No. 119," for identification.)

Mr. Hier: Mr. Examiner, I understand that it is agreeable to counsel for the respondents that the chart which has been marked for identification purposes Commission's Exhibit No. 119, for identification, a part of which now is displayed on the blackboard here, may be admitted in evidence as disclosing in graph form the price levels and the price changes of the respondents from June 19th, 1936, to December 31, 1939.

Is that correct, Mr. McCollester?

Mr. McCollester: Yes.

Trial Examiner Hornor: Then it will be received in evidence as Commission's Exhibit No. 119.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No. 119" was received in evidence.)

Trial Examiner Hornor: What about Commission's Exhibit No. 118, for identification?

Mr. Hier: I probably should have offered that in evidence.

I will now offer that in evidence, if the Examiner please, as Commission's Exhibit No. 118.

Trial Examiner Hornor: Is there any objection to 786 this document going in?

Mr. McCollester: I have no objection to it being received as a photostatic copy of whatever it is. The form is all right. There is some stamped material on there. Whether that was on there at the time or whether it is usually put on there or not, of course, I don't know.

Mr. Hier: I will make this agreement with you. If Mr. Cull will bring down one of the forms that the company uses, a blank form, I will substitute that in place of this one.

Mr. McCollester: I am perfectly willing to have this go in as far as the printed matter is concerned.

The Witness: I don't think the Chicago office puts any stamps on it, or anything of that kind.

Mr. McCollester: It is just the stamps that I am referring to.

Trial Examiner Hornor: Well, it is just offered as a sample form.

Mr. Hier: Yes, that is all, if the Examiner please.

Mr. McCollester: We do not agree as to the other material on it.

Trial Examiner Hornor: That is right. Only as a sample of the form that was used.

It may be received in evidence and marked Commission's Exhibit No. 118.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No 118" was received in evidence.)

Trial Examiner Hornor: Now, is there something further that you want to ask the witness?

Mr. Hier: Yes.

Trial Examiner Hornor: Proceed.

By Mr. Hier:

Q. Mr. Cull, will you look at this chart that is on the blackboard?

A. May I stand over there?

Mr. Hier: Certainly. I was about to ask you if you could see it from where you are.

The Witness: No.

Mr. Hier: I would suggest that the witness come over here. The reporter might come over here also.

By Mr. Hier:

Q. Mr. Cull, on the left-hand side here of the chart you will notice that there are various price levels ranging from \$2.09 to \$3.59 (indicating).

A. Yes.

Q. Representing the price per hundredweight of glucose in tank car lots, Chicago.

A. Yes.

788 Q. You will notice the upper spaces here (indicating) are marked off in months and years. Each one of these small spaces representing a day in a given month. Now, I want to ask you this. This is from the chart, April 7th, 1937, and this represents a price increase from the level of \$3.04, as you can see on the left, to a price level of \$3.49.

(Indicating.)

A. Yes.

Q. An increase made by your company on April 7th, 1937.

A. Yes.

Q. As I understand your testimony, Mr. Cull, this increase of 35 cents on April 7th was not charged against buyers who ordered at \$3.04, and for five days thereafter, which would be April 12th. Is that correct?

Mr. McCollester: I think you said "35 cents." It should be 45 cents.

Mr. Hier: Yes, I should have said 45 cents.

The Witness: I will say according to my knowledge it was not; but, as I said before, at that particular time I was not handling the details of the orders, but I know that those are our terms, and our company is rather strict in obeying the terms that the headquarter office sets down.

By Mr. Hier:

Q. So far as you know, then, no glucose was sold by your company after April 12th, 1937, at \$3.04?

789 A. As I say, I don't know, but I should think not.

Q. So far as you know?

A. That's right.

Q. No glucose was shipped at \$3.04 after May 7th, was it, or thirty days from April 7th?

A. I cannot answer that, but, as I say—

By Mr. McCollester:

Q. So far as you know?

A. So far as I know; but I am not in a position to know very much about that.

By Mr. Hier:

Q. Is there any one in the Chicago office, any person in the Chicago office who does know, from his own recollection, about that.

A. Mr. Kirkland is the only one who would have any details on that thing that you have in mind, as he is in charge.

Q. Does Mr. Kirkland have an assistant?

A. Well, there are office clerks that he has, the same as we have. Our records might indicate it.

Mr. Hier: I was going to get to that in just a minute.

Mr. McCollester: Just a minute. May I say something off the record, Mr. Examiner?

Trial Examiner Hornor: Off the record.

(There was a discussion off the record.)

790 Trial Examiner Hornor: On the record.

By Mr. Hier:

Q. Then, as far as I can gather from your statement, Mr. Cull, there is no one person in the Chicago office who would know the answers to the questions I have just been putting to you since our recess?

A. I would say that they probably wouldn't know without an examination of the records, other than what I could ascertain.

Q. How about your salesmen? Have they been there for a long time?

A. Oh, yes, I suppose the salesmen might have some recollection, but they wouldn't, perhaps, know definitely whether that order had been billed. The salesman might have some recollection from having discussed it with Mr. Kirkland.

Q. Do you have a salesman there by the name of Art Anderson?

A. Yes.



Q. How long has he been selling bulk glucose here in Chicago?

A. Around twenty years. He has been with the company longer than that, but it has been about twenty years that he has been selling bulk.

Q. Would he be able to testify to that?

A. Only by recollection.

Mr. McCollester: Mr. Examiner, again I recall that 791 we told counsel for the Commission that Mr. Schmitt in New York was the man who was thoroughly familiar with the facts to be developed by this line of questioning.

Mr. Hier: I am merely trying to find out what I can.

The Witness: I will say that Mr. Schmitt has detailed knowledge of every transaction because our transactions that we make here are cleared through Mr. Schmitt and no one else.

800 Mr. Hier: It is stipulated and agreed between counsel that the blank form No. 232, Corn Products Sales Company, now marked Commission's Exhibit 118 may be substituted for the photostat previously marked and introduced into evidence as Commission's Exhibit No. 118, and that said photostat may be withdrawn from the record.

Is that agreeable?

Mr. McCollester: That is agreeable.

Trial Examiner Hornor: The substitution may be made. By Mr. Hier: (

Q. Now, then, one question about that exhibit there, Mr. Cull. I understand you wish to correct your testimony given this morning to the effect that that Exhibit No. 118 is filled out in New York. I understand the situation is that three copies of that form known as Commission's Exhibit No. 118 are made out in your office here in Chicago?

A. Yes, sir.

Q. And one of them goes to the customer?

A. Well, not by us. We send them to New York and New York sends it.

Q. You send two to New York and one here, is that correct?

A. I think we send two to New York, yes.

Mr. Hier: All right. Mark this Commission's Exhibit No. 120 for identification.

(The document above referred to was thereupon marked "Commission's Exhibit 120" for identification.)

By Mr. Hier:

Q. I hand you a document which has been marked for identification as Commission's Exhibit 120 and ask you what that is?

(Passing document to witness.)

A. Form No. 45, this is used in connection with the booking sheet, what we call our contract sheet and indicates the details of shipment. In other words, this is our specification blank.

Q. In other words, this document marked Commission's Exhibit No. 120 for identification is filled out after you receive a definite order on shipping instructions?

A. Yes, but it may be filled at the same time. It all 802 depends on whether or not the order has been specified for shipment.

Q. It is not filled out until the customer specifies?

A. This would indicate shipment.

Q. Where is this sent?

A. Also to New York.

Q. Two copies to New York?

A. Well, I am not sure about that, but I presume we keep one for our files. My boy told me there is two copies made. I would assume therefore that one is for our files and the other for New York.

Mr. Hier: All right, I offer it in evidence.

Mr. McColester: No objection.

Trial Examiner Hornor: It will be received.

(The document above referred to heretofore marked for identification "COMMISSION'S EXHIBIT 120" was received in evidence.)

Mr. Hier: Will you mark this Commission's Exhibit No. 121 for identification?

(The document above referred to was thereupon marked "Commission's Exhibit 121" for identification.)

By Mr. Hier:

Q. Mr. Cull, the document marked for identification Commission's Exhibit No. 121, will you examine that 803 and tell us what it is used for?

(Passing exhibit to witness.)

A. This is form No. 288. This is the form we use in reporting to our headquarters office that business that is received for tank wagon and l.-c. l. shipments.

Q. For tank wagon and l. c. l. shipments?

A. L. e. l., I mean the shipments from the warehouse, whatever it may be.

Q. In other words, this is the form that contains bookings made after a price advance for tank wagon and l. c. l. shipments?

A. No, tank cars—excuse me—

Q. The one you have in your hand?

A. Yes, for tank wagon and l. c. l.

Q. To make it clear in the record then, Commission's Exhibit No. 118, that is this (indicating)—

A. Yes.

Q. (Continuing.) —is what you report bookings on after a price advance for tank cars?

A. For carload business.

Q. And Commission's Exhibit No. 120, that document you have in your hand there, is the form used to report to New York bookings after a price advance for l. c. l. and tank wagon?

A. Yes.

Mr. Hier: I offer this in evidence.

804 Trial Examiner Hornor: It will be received.

(The document above referred to heretofore marked for identification "COMMISSION'S EXHIBIT 121" was received in evidence.)

Mr. Hier: Mark these two papers Commission's Exhibits 122-A and B.

(The documents above referred to were thereupon marked "Commission's Exhibits 122-A and B" for identification.)

Mr. Hier: May it be stipulated between counsel that the documents marked for identification Commission's Exhibit No. 122-A and 122-B contain a list of sales by the Corn Products Refining Company to E. J. Brach & Sons of Chicago, Illinois, from June 19th, 1936, to December 31st, 1939, together with the date of order, the date of shipment, the commodity and the price as furnished to counsel for the Commission by counsel for Respondents.

Is that agreeable?

Mr. McCollester: It is.

Mr. Hier: I offer that in evidence.

Trial Examiner Hornor: It will be received.

(The documents above referred to heretofore marked for identification "COMMISSION'S EXHIBITS 122-A and B," were received in evidence.)

Mr. Hier: There is no objection to any of these 805 documents I have offered, is there?

Mr. McCollester: No, no objection so far as I know to their authenticity. There is objection, as I understand and shows on the record, to all this line of testimony as not within the scope of the complaint.

Trial Examiner Hornor: And that objection is overruled.

By Mr. Hier:

Q. Now, Mr. Cull, looking at Commission's Exhibit No. 122-A and B and whatever records of your company you have, can you tell me if you have any documents to show the orders which were entered on the dates given under the column "Date of order"?

A. We have a record beginning January—I see it here November 9th, 1936, but beginning with shipments after January 1st, 1937. We have no records in our Chicago office prior to that time, and we also have no invoices according to the inquiry I made of our invoice department, prior to July 1st, 1938, and as far as I know, I am not quite sure of it, we have no correspondence dating back more than perhaps two years or a little more.

Q. Whatever records were in existence then have subsequently been destroyed?

A. As a matter of routine they have been destroyed.

Q. Well, then, calling your attention particularly on 806 Commission's Exhibit No. 122-A and B to some 15 cars, all apparently ordered on 7-6-36 and shipped beginning 7-28-36 through 10-17-36, as I understand it you have nothing—

A. I have nothing—

Q. Let me finish. (Continuing.) —you have nothing in your records here in Chicago, and no independent recollection either to show that order was entered, what the order was, what it was for or by whom, except the entry on that bookkeeping record of yours?

A. I have no evidence, no.

Mr. McCollester: Except the bookkeeping entry that you have in your hand?

The Witness: On this one—well, he is referring to these items here, July 4th, isn't that so, Mr. Hier?

Mr. Hier: Yes.

By Mr. Hier:

Q. You do not know what salesman made the sale?

A. Yes.

Q. Who was it?

A. The salesman in charge of that is C. H. Kirkland.

Q. I do not mean salesman in charge of it, I mean the salesman who actually made the sale.

A. C. H. Kirkland called on the trade on the Brach account and I know of no person who would take business outside of Mr. Kirkland.

807 Q. Your statement is then that Mr. Kirkland made these sales of these 15 cars to which I have referred, all apparently ordered on 7-6-36?

A. Well, I would say that Kirkland would be the only one who would have that handling, yes, that I know of.

Q. You have nothing to show that?

A. No.

Q. That is just your impression?

A. Yes.

Q. You have nothing to show whether those orders were phoned in, sent in or solicited or anything of that sort?

A. No. Sorry, no.

Q. Do you know who made that entry on your books "7-6-36"?

A. I have no entry of 7-6-36. I have an entry November 4th, 1936.

Q. But no entry 7-6-36?

A. None before that.

Q. So as to these cars ordered on 7-6-36 there is nothing in your records whatever?

A. No.

Q. To show the ordering?

A. No.

Q. Now, calling your attention, Mr. Cull, to the shipment dates given on Commission's Exhibit No. 122-A, I understood you to testify this morning that it was a  
808 rare and exceptional case when glucose was shipped more than 30 days past the date of order.

A. Yes. I made that statement, but then I also qualified the statement earlier in my testimony, that I was referring particularly to that period after the latter part of 1938, stating that I did not have the detailed knowledge of what occurred before that time.

Q. Well, you note that all of these sales were made at a price of \$2.44?

A. Yes.

Q. Now, if you look over on that chart, which is Commission's Exhibit No. 119, also look at the shipment dates—



A. Is this 1936?

Q. Yes, sir, this is 7-6-36. (Continuing.) —also look at the shipment dates of the first 15 cars on Commission's Exhibit No. 122-A, you will note, will you not, that those cars were shipped beginning 7-28-36 and extending through 10-17-36, October 17th, all at a price level of \$2.44, when your price at that time was as high as \$3.44, and after August 1st was down lower than \$3.04 until October, isn't that correct?

Mr. McCollester: The exhibits speak for themselves on that.

The Witness: That is correct on the records.

809 By Mr. Hier:

Q. Yes. Now, let me ask you this.

A. I have one explanation I could make, it may not mean very much, if you would like me to.

Q. All right.

A. And that is, you recall in 1936 that we had a drought condition and that probably will account for the rather sudden advance in the market. And at that time of course, business came in tremendously heavy. I am referring more particularly now to the package end with which I am very familiar, and to a point where we had a great deal of factory congestion. That is merely an unofficial explanation that I am offering. That might be the reason.

Q. Mr. Cull, I will ask you if it is not true that the Corn Products Sales Company and the Corn Products Refining Company sold to other customers in Chicago during that particular period from July until October of 1936, in accordance with the price chart known as Commission's Exhibit No. 119?

A. I am not in position to answer.

Q. Well, you would not say that they did not, would you?

Mr. McCollester: I object to that. I object to any inferences.

Trial Examiner Hornor: Just a minute. Was that under your supervision at that time?

810 The Witness: That was under my nominal supervision, but as I explained—

Trial Examiner Hornor: You were responsible for those under you at that time?

The Witness: In a way Kirkland—

Trial Examiner Hornor: All right, sir.

The Witness: Kirkland was definitely charged with the responsibility of bulk operations, I was not. I had the title of manager of all the sales department in Chicago, but my activity was not in bulk.

Mr. Hier: Well, if you will give me a few minutes, Mr. Examiner, I will see if I can find some sales.

Mr. McCollester: Mr. Examiner, perhaps I had better say my objection goes not to counsel's endeavoring to prove this sort of evidence, although my general objection covers that too, but rather to questioning the witness in view of the witness' explanation of his position with the company.

Now, we have furnished counsel with statements of all shipments, so far as I know, in the Chicago area.

Mr. Hier: In tank car lots.

Mr. McCollester: In tank car lots, he has full information. What I do object to is with that full information questioning the witness, whose position was not such that he could be familiar with the details. He has another way on the information we furnished him of proving his point, if he wants to do it, and I have no objection to that, except general objection.

Mr. Hier: Mr. Examiner, it was not requested and was not furnished however, a lot of sales in smaller lots than tank cars made in the Chicago area.

Trial Examiner Hornor: I gather that this gentleman was responsible, in charge of that business?

Mr. McCollester: I think you are mistaken on that, Mr. Examiner. We have explained to counsel, and I think we have explained on the record here, that the man who was responsible and in charge was Mr. Schmitt who was subpoenaed at New York, and who was ready to testify, and he was excused. We do not know why he was not questioned on this information there. He had with him data from which counsel is now examining this witness. I think it is a most unfair way of proceeding.

Mr. Hier: Mark this Commission's Exhibit No. 123 for identification.

(The document above referred to was thereupon marked "Commission's Exhibit 123" for identification.)

Mr. Hier: I would like to offer in evidence by stipulation of counsel the document marked Commission's Exhibit 812 No. 123 for identification, showing sales in tank wagon lots by the respondent to Walter H. Johnson Candy Company during this same period about which I have been

interrogating this witness, with the prices thereon for each of those sales. It is all right with you, is it not, Mr. McCollester?

Mr. McCollester: No objection, except the general objection.

Trial Examiner Hornor: The general objection is overruled and it will be received.

(The document above referred to heretofore marked for identification "COMMISSION'S EXHIBIT 123" was received in evidence.)

By Mr. Hier:

Q. Mr. Cull, will you look at Commission's Exhibit No. 122-A and look at the first 15 entries thereon?

(Passing exhibit to witness.)

A. Which are July 6th entries?

Q. Yes, and particularly the shipment entries and tell me if you know of your own knowledge why those shipments were made at a period three months after the order was entered?

A. No, I do not.

Q. Do you know of your own knowledge whether similar delayed shipments were made to other customers?

A. No, I do not.

Q. All right. Will you glance down the page then 813 under the column headed "Date of order" and look at the notation 3-25-37?

A. Yes, sir.

Q. I think you will note therein that some 27 cars, tank cars were listed as being ordered on that date. Now, then, you have no record in your office of any such order over and beyond the entry about which you previously testified, is that right?

A. Well, we have a record in our office of this March 25th, yes.

Q. But I say other than that?

A. Other than this, no.

Mr. McCollester: The witness is referring to two yellow sheets which he has in his hand.

Mr. Hier: I do not want to put them into evidence necessarily.

Mr. McCollester: I do not want them in the record, but I want the record to show what they are.

By Mr. Hier:

Q. You have no record in your office such as this Commission's Exhibit No. 118?

A. Not of that date, no.

Q. Covering this order?

A. No.

Q. I see. Can you give me any particular reason of  
814 your own knowledge that you know, Mr. Cull, why you  
entered a booking for E. J. Brach & Sons on 3-25-37 for  
27 tank cars of glucose?

A. I cannot give any explanation of my own knowledge,  
no, sir, except that I recall during that year our competitors  
were very active in covering the trade, and that would be  
the only explanation I could make.

Q. You do not know anything about that of your own  
knowledge?

A. No. I do remember, however, that that was handled  
by Kirkland.

Q. Do you know of any reason—

A. I remember the order coming in but I do not remem-  
ber anything else about it.

Q. Do you know of any reason, Mr. Cull, why only two  
of those cars were shipped before June 1st of that year and  
most of them, or quite a number of them were shipped on  
July 1st, 2nd and 3rd of that year?

A. No, sir, except my guess would be that with this kind  
of booking, if this came from our customers, and undoubt-  
edly it did, there must have been a lot of factory congestion,  
but that is the only explanation I could offer.

Q. You have no other reason that you know of?

A. No.

Q. Do you recall the price level at that time?

815 A. No, sir.

Mr. McClester: May I take a telephone call, Mr.  
Examiner?

Trial Examiner Hornor: Yes, we will take a short recess.  
(A short recess was taken.)

Trial Examiner Hornor: All right, gentlemen, we will  
proceed.

By Mr. Hier:

Q. Mr. Cull, one of these tank cars contains approxi-  
mately 95,000 pounds of glucose?

A. About that.

Q. To sum it up then, as I understand it, even though you  
were officially in charge of the Chicago office, you wish it to  
appear to the Commission that you have no recollection of  
the entry, the circumstances surrounding the entry of order

for 27 cars by E. J. Brach & Sons, Incorporated, of Chicago on March 25th, 1937?

A. I have no knowledge of the details of the transaction. I do know that an order of good size was handled at that time. I do not have recollection of the 27 cars. However, at the time I knew it was a nice order.

Mr. Hier: Off the record.

(There was a discussion off the record.)

Mr. Hier: Mark these documents Commission's 816 Exhibits Nos. 124 and 125 for identification.

(The documents above referred to were thereupon marked "Commission's Exhibits 124 and 125," for identification.)

Mr. Hier: If your Honor please, I offer in evidence Commission's Exhibits Nos. 124 and 125, purporting to be the respondents' form No. 232 made out for particular orders of E. J. Brach & Sons.

Mr. McCollester: I have no objection.

Trial Examiner Hornor: They will be received as Commission's Exhibits Nos. 124 and 125.

(The documents above referred to heretofore marked for identification "COMMISSION'S EXHIBITS 124 and 125," were received in evidence.)

By Mr. Hier:

Q. Mr. Cull, are you familiar with the forms upon which this particular customer sends in purchase orders or possibly what you call shipping directions—specifications?

A. No, I am sorry I am not.

Q. Well, I will ask you to look at this—

A. I think I have seen them, I am not sure.

(Exhibit passed to witness.)

The Witness: I am not familiar with them, matters of that kind usually go to the order desk and I do not see them very often.

817 By Mr. Hier:

Q. You would not be able to state whether or not that was a regular purchase order received from them?

A. I could not say, no.

Mr. Hier: All right.

Mr. Layton: I should like to have marked for identification 26 sheets purporting to show tank wagon deliveries to Chicago confectioners 6-19-36 to 12-31-39 with reference to the Crystal Pure Candy Company which were furnished to counsel for the Commission by counsel for respondents.



And one additional sheet showing the shipments to Chicago confectioners Crystal Pure Candy Company in tank cars for the same period.

(The documents above referred to were thereupon marked "Commission's Exhibits 126-A to-Z, and 127," for identification.)

Mr. Layton: Then I ask counsel for the respondents if that may be taken as representing the shipments as indicated, as furnished to us.

Mr. McCollester: I do not know exactly what you mean by that, but I have no objection to the exhibit and I am willing to state that the information shown on the exhibit is taken from the records of the company and furnished to you, and as far as I know are correct.

Trial Examiner Hornor: All right, they will be 818 received, both the exhibits Nos. 126-A to Z and 127.

(The documents above referred to heretofore marked for identification "COMMISSION'S EXHIBITS 126-A to Z and 127," were received in evidence.)

By Mr. Layton:

Q. Do you have any records with you, Mr. Cull, which would indicate the number of railroad tank cars which were shipped to the Crystal Pure Candy Company during the year 1937?

A. I have a record; yes, sir, I have.

Q. What tank cars were shipped to them according to your record, designating them as to number; what are the numbers of the tank cars that you show as having been shipped?

A. 542—

Q: That CCLX 542?

A. Yes.

Q: That is the car that was shipped when?

A. This shows shipping date of May 11th.

Q. That is 5-11-37?

A. Yes.

Q. All right.

A. 526 shows shipping date according to this—

Q. That is CCLX 526?

A. That is right. (Continuing.) —of 5-19. CCLX 647 shows shipping date of 5-24. CCLX 534 shows shipping date of May 28th.

819 CCLX 547 shows shipping date of June 3rd. CCLX 619 shows shipping date of June 10th.

Q. All right.

A. And CCLX 508 shows shipping date of June 30th.

Q. Do your records show, Mr. Cull, whether or not those tank cars were shipped to the Crystal Pure Candy Company?

A. My records would indicate that they were not shipped directly to the Crystal Pure Candy Company. I would say that, from looking at the record and not being fully familiar with the transaction, that they were delivered in tank wagon lots.

Q. Let us just trace those through so we can have it clear in the record. Let us take tank car CCLX 542.

A. Yes, sir.

Q. When do your records indicate that with reference to that tank car, shipments were actually made?

A. I am sorry, but I will have to get over toward the window.

Q. All right. When were shipments actually made as to that car?

A. That is 542?

Q. Yes.

A. Well, there seems to be two tank cars delivered—tank wagons rather—

Q. Yes.

820 A. (Continuing.) —delivered on May 13th; another May 14th, another May 15th, another May 12th, although I am not sure whether—I guess that is 17; two on May 17th, I imagine. Another on May 18th, another on May 19th, or two on May 19th, and one on May 20th. Of course, there are varying quantities.

Q. Yes. Now, let us take tank car CCLX 524.

A. I did not qualify 524.

Q. 526, excuse me.

A. Oh, yes. That would indicate tank wagon deliveries on May 20th, 21st, 22nd, 24th, 25th, 27th—in fact, two on the 27th; 28th and June 1st. Would you like to have the total amount?

Q. What was the last one you read with reference to that car 526?

A. June 1st.

Q. June 1st, yes. Now, let us take, it won't take but a short time, I would like to get that for CCLX 647.

A. June 1st, 2nd—when I read the date twice that means two deliveries.

Q. All right.

A. (Continuing.) 2nd, 3rd, 4th, 7th, 7th, 8th, 9th, 10th.

Q. All right. Now, CCLX 534.

A. June 10th, 11th, 15th, 16th, 18th, 22nd, 22nd, 23rd, 24th.

Q. That was June?

A. That was June, yes.

821 Q. All right. Now, CCLX 547.

A. 24th, 28th—

Q. That is June?

A. June, yes, sir.

Q. All right.

A. 29th, 30th, July 1st, 2nd, 6th, 7th, 8th.

Q. Now, with reference to car CCLX 619.

A. July 8th, 13th, 15th, 16th, 19th, 20th, and I cannot read this—

Q. Well, let us just indicate one car you cannot read.

A. Oh, I have it. After the 20th is 22nd, 23rd and I think another 23rd.

Q. You are not sure of the last, that is all right. Is the last one the one you cannot make out?

A. I am quite sure it is only a small quantity. No, I think—

Q. Would it be the 26th?

A. I think it is the 26th, yes. Yes, it is the 26th.

Q. Now, CCLX 508.

A. July 26th, 27th, 28th, 29th, and then we have a note here that the balance, the 51,000 pounds is cancelled.

Q. All right. Looking at Commission's Exhibit No. 126 and beginning on 126-F, how many tank wagons does that indicate were sold and shipped to the Crystal Pure Candy Company in January, 1937?

822 A. That is as stated on this list?

Q. Yes.

A. In January there is one—

Mr. McClester: You are referring to the delivery date now, or the order date?

Mr. Layton: Let us call it the delivery date.

The Witness: You are talking about tank wagons?

By Mr. Layton:

Q. That is right.

A. 22.

Q. 22?

A. Yes.

Q. And roughly, of course they do vary somewhat, but roughly they are around 12,000 pounds, are they not?

A. Yes. They vary.

Q. Yes. Your answer there was 22?

A. I hope I am right, yes, sir.

Mr. McCollester: It shows on the exhibit itself.

By Mr. Layton:

Q. At 12,000 pounds then that would be roughly, subject to correction that would amount to 264,000 pounds?

A. The 22?

Q. Yes.

A. Yes, sir.

Q. Looking further at Commission's Exhibit No. 823 126 and beginning with G of that exhibit I wonder if you would indicate how many tank cars are shown as having been sold and shipped to Crystal Pure Company on and after 3-25-37; tank wagons?

Mr. McCollester: Off the record.

(There was a discussion off the record.)

Mr. Layton: I will state further, the point as we see it is the extent to which purchasers' requirements have been booked with relation to their normal requirements, and although as stated by counsel for the Respondents the figures do appear, no comparison can be made unless those totals are calculated either by the witness or by myself or by somebody else.

Mr. McCollester: I am perfectly willing to allow the witness to calculate from the exhibit—

Mr. Layton: That is what I want him to do.

Mr. McCollester: I mean allow counsel to calculate from the exhibit. I do not think the witness ought to be asked what is on the exhibit.

Mr. Layton: According to Commission's Exhibit No. 126, beginning with page G of that exhibit and continuing over to page H of that exhibit, there is shown that approximately 52 tank wagons of corn syrup unmixed were sold and shipped by Respondents to Crystal Pure Candy Company between March 25th, 1937, and May 11th, 1937, all of 824 which 52 according to the same exhibit were ordered by the customer on March 25th, 1937. Subject to correction—

Mr. McCollester: Subject to correction if that appears on the exhibit, it appears on the exhibit.

Mr. Layton (continuing): —we establish the figure from that exhibit of 52 tank wagons. From Commission's

Exhibit No. 127 to which the witness has referred there appears that 7 tank cars of corn syrup unnnixed or the contents thereof, were sold to this customer, and that it has been testified that each tank car showed approximately—weighed approximately 95,000 pounds, and that therefore during the same period 665,000 pounds approximately were sold and delivered to this customer, all of which as indicated on Commission's Exhibit No. 127 were ordered by this customer on March 25th, 1937.

I ask the reporter to read back the date upon which the last tank wagon was shipped with reference to Car CCLX 508.

(The date referred to was read by the reporter as follows: "Answer: July 26th, 27th, 28th and 29th \* \* \*—").

By Mr. Layton:

Q. Do you of your own knowledge remember of having entered into a contract with the Crystal Pure Company on March 25th, 1937, to ship to them what calculates to be 825 approximately 1,200,000 pounds of corn syrup unnnixed for delivery commencing then and extending to July 29th, 1937?

A. I do not know from my own knowledge this particular transaction. I do know that during that period there was similar bookings with customers in position to use quantities of the kind made by us after we followed our competitors' actions in that regard, but I do not know the details of this particular transaction.

Q. We made a statement a moment ago that in January, 1937, this customer purchased roughly, subject to correction, approximately 264,000 pounds of corn syrup; do you remember that calculation?

A. Yes, sir.

Q. That being some indication of what they took in a month, referring to our other calculation of approximately 1,200,000 pounds for which they secured deliveries over a period of four months, that would indicate that you had booked them for roughly four months requirements, would it not?

A. According to what you say it would seem so, yes, sir.

Q. With reference to competitors, do you know whether or not at that time or at any time since June 19th, 1936, whether or not your competitors have sold any corn syrup unnnixed to this customer?



A. To my knowledge our competitors did not sell to this customer during that period. Of course, they did to other customers.

826 Q. Now, let us go back to the tank cars—

Trial Examiner Hornor: Mr. Witness, confine your answers, please, to the question.

The Witness: Yes, sir.

By Mr. Layton:

Q. Going back to the tank car, do you know whether or not this customer has facilities for taking and handling tank car shipments at its plant?

A. He has no facilities for handling tank car shipments because he only has storage capacity suitable for handling tank wagon capacities.

Q. How could you sell him a tank car?

A. A tank car could be sold by having the service through our own warehouse.

Q. Do you know what happened to this glucose after it reached your warehouse? For instance, let us take tank car CCLX-542, the one—the first one we have mentioned. Do you know what happened to that car after it left your factory?

A. No.

Q. Well, was it shipped to the customer?

Mr. McCollester: If he knows.

The Witness: Do I know whether it was shipped to the customer? No, I do not know that it was shipped to the customer.

By Mr. Layton:

827 Q. But you have stated that the customer did not have any facilities.

A. Yes: My guess is that it was not shipped to the customer.

Q. But you do not know of your own knowledge where it was shipped?

A. No.

Q. Who would have made this arrangement with the Crystal Pure Candy Company?

A. Mr. Fred Miller and Mr. E. W. Schmitt in New York would have handled it.

Q. If a purchaser had been purchasing from day to day a few tank wagons of twelve thousand pounds each, and you being the superior in charge of the Chicago office, would it

not be strange indeed if it were not called to your attention that they had secured an order from that customer for 1,200,000 pounds, the normal requirements of that plant extending the shipments for four months.

A. I would say today it would be, Mr. Layton, but when we had a man in 1937 by the name of Kirkland who was definitely in charge of those bulk operations, then of course it was not to be expected that the work would be duplicated by having it referred to me. I may go further and say that Mr. Kirkland referred all matters, as I have said before, to our headquarters office, who only had authority for the acceptance or rejection of business.

828 Mr. McCollester: That is New York you mean when you refer to headquarters office?

The Witness: At New York; yes.

By Mr. Layton:

Q. Are you familiar with the way the Chicago warehouse operates?

A. I think so.

Q. How does it operate upon shipments being made to it from any or all of your plants?

A. You are talking of glucose?

Q. Yes.

A. We receive our supplies in tank cars from our Argo plant except, of course, in some unusual condition it may come from another plant, but we will say from Argo. They are placed at our siding and they are pumped into our storage tanks. And I am not able to say just how many storage tanks we have—

Q. But you have several?

A. We have more than one, we have several, and naturally would have to, because there is different gravity of corn syrup unmixed. Does that answer your question?

Q. Are you familiar with any arrangement of this kind of sales of tank cars to tank wagon purchasers?

Mr. McCollester: Wait a minute. Could I hear that question?

829 By Mr. Layton:

Q. I asked does he know, he has testified he does not know about this one, does he know of any other tank cars having been sold to tank wagon purchasers.

A. I did not say that I did not know that tank cars are sold to tank wagon purchasers; I stated according to my

recollection that we and competitors at this particular time—

By Mr. Layton:

Q. Then you do have recollection of this transaction?

A. I said of the general proposition, but I have—

Q. How did it work as a general proposition?

Mr. McCollester: Let him finish his answer, please, Mr. Layton.

The Witness (continuing): —but I have no definite knowledge of any individual transaction.

By Mr. Layton:

Q. Do I infer that you say you have knowledge of the way the general situation worked, but there were more than one?

A. I know at that particular time that things of that kind were being done throughout the industry. Now, as to the matter—the orders received or anything of that kind, I am sorry.

Q. What was this thing that was being done that you have knowledge of, how did it work, what was its purpose?

A. My knowledge was this, and it is not particularly reliable, but the recollection that I have is that the tank wagon buyers at that particular time had argued that they were being discriminated against by the fellows who could buy in tank cars, and that therefore, when an expiration term occurred on tank wagons, the tank wagon buyer was cut off on that particular date, and that the buyer of a tank car would have perhaps a couple of extra days in the transit from the plant to the expiration date at the time it arrived, and, of course, those buyers had storage capacity.

Now, I know that that controversy was quite bitter on the part of the tank wagon buyers, and my recollection is, although as I say, it is not fully reliable, that our competitors took orders in tank car lots from such buyers, which I suppose forced us to do likewise. But unfortunately I was not fully in charge of the operations at that time.

Q. Under those arrangements were the tank cars, as dumped into those tank cars to be the property of the purchaser?

A. The tank car—

Q. Let us take for example the car CCLX-542, if that is the way that transaction was handled and it was dumped in one of your tank cars, was that to be the property of the Crystal Pure Candy Company?

A. Only from a bookkeeping standpoint. Naturally, C. S. U. is C. S. U., and if we charged against that storage capacity certain number of pounds for Crystal Pure 831 or someone else, it made little difference from the standpoint of the customer or ourselves whether that was actually taken from 546 or 646. The amount, in other words, was a bookkeeping proposition.

Mr. McCollester: I think what Mr. Layton is trying to bring out is whether the customer after paying you for the C. S. U., whether it became his property.

Mr. Layton: No, no. See if the record which you have there indicates what kind of C. S. U. was said to be shipped in CCLX-542, what type or kind of glucose or corn syrup was in that car?

The Witness: 542?

By Mr. Layton:

Q. That is right, I think that is the first one.

A. Oh, yes. 42 degree baume.

Q. Would 42 degree baume glucose be mixed with 43 degree baume?

A. No, sir; no, sir.

Q. Could any 43 degree baume glucose have come from that car?

A. Well, it could, but it would not be likely, no.

Q. How could it?

A. Oh, from that particular car?

Q. Yes.

A. Well, that car according to these records was filled with 27 C. S. U.—

832 Q. That means 42—

A. (Continuing.) —and at our warehouse we—

Q. Assuming the accuracy of that, could any 43 degrees baume glucose have come from that car?

A. I would say no.

Mr. Layton: No.

By Mr. Hier:

Q. Mr. Cull, referring to Commission's Exhibit No. 127, which purports to be corn syrup unmixed shipments to Chicago Confectioners 6-19-36 to 12-31-39. Crystal Pure Candy Company tank cars, seven of them, I want to ask you if you sold those tank cars of corn syrup or did not?

A. Did I sell them?

Q. Did the company sell them?

A. I would say, sir—if those are the tank cars we have been discussing—

Q. Yes.

A. (Continuing.) —if they have been, I would say as they appear on our records the company sold them.

Q. Would you say the glucose contained in those seven cars or any of them was sold by the respondents to the Crystal Pure Candy Company?

A. I would say so, yes, sir.

Q. And it was shipped on the date shown therein?

Mr. McCollester: If he knows.

833 Mr. Hier: Well, of course.

Mr. McCollester: Well, I know, but is he doing any more than testifying from the exhibit itself?

Mr. Hier: I want to know whether that exhibit is correct or not. It was furnished to us by you and he says this man cannot take deliveries in tank cars. That exhibit purports to show the sale of seven tank cars to the Crystal Pure Candy Company and I want to know if that glucose was sold to them in those tank cars or was not according to the best of your knowledge.

The Witness: I would say to the best of my knowledge it was sold and invoiced on the dates shown—shipped and invoiced on the dates shown. Whether the distribution was made on that particular day, I should imagine from the information that I have given you that there was a variance, but I imagine this represents the day on which the invoice was made, the billing was made. I am not sure of that, that is my guess.

By Mr. Hier:

Q. As a matter of fact, Mr. Cull, is it not a fact that none of the glucose in those tank cars was sold as tank car sales, that the glucose was supplied according to the way you testified here a minute ago out of your vat in your warehouse on the dates given?

A. I am quite sure of it because it would be physically impossible to ship a car in that way.

Q. So there were no sales or shipments as shown on 127?

A. No. And our records do not indicate that.

Q. Then, insofar as this exhibit purports to reflect the sale of seven tank cars and orders of seven tank cars and shipment of seven tank cars to Crystal Pure Candy Company, it is entirely incorrect, is that right?



A. No, sir, I would say it is not incorrect, because a tank car was shipped and apparently billed, but split up in other ways to meet the physical requirements of the situation.

By Trial Examiner Hornor:

Q. It was not delivered in those—

A. Not in its original container, no, sir. That is to the best of my knowledge.

Q. And no tank car quantity was delivered to the customer?

A. Oh, yes, sir.

Q. As a tank car?

A. You mean in one unit?

Q. Yes.

A. No, sir.

Q. As the sale shows?

A. No, sir.

Q. How is that, did you say yes or no?

A. I say that no tank car was delivered to the customer to the best of my knowledge, in one unit, that is one container.

S35 Trial Examiner Hornor: Yes.

By Mr. McCollester:

Q. When you say delivered to the customer, you mean delivered at the customer's place of business?

A. Sure, because the customer has no facilities for unloading the tank car.

Q. But you are not saying it did not pass into the customer's title and possession as a tank car lot?

A. I am quite sure it did.

By Trial Examiner Hornor:

Q. And the customer received the actual contents of that car?

A. The customer I should think your Honor, did not receive—

Mr. McCollester: Well, I do not think we want speculation.

Trial Examiner Hornor: What he thinks about it, no, sir. Did the customer receive the actual contents of the cars which you sold and billed to the customer?

Mr. McCollester: If you know?

By Trial Examiner Hornor:

Q. According to your records there?

A. According to my records?

Q. Yes, sir.

A. According to my records the appearance is that we did not.

836 Trial Examiner Hornor: Go ahead.

By Mr. Layton:

Q. Let's take the last car which you mentioned, car CCLX 508.

A. Yes, sir.

Q. Do you have any record there of how much corn syrup unmixed was in that car?

A. Yes.

Q. How much?

A. It is a matter of calculation, I would have to calculate it.

Q. Oh, I thought—

A. The only record I have here that this apparently was a partial transaction. The only record I have here that 51,000 was cancelled, so apparently around 44 or 45,000 was delivered.

Q. In other words, out of that tank car, assuming, which we may I think, that it was a normal tank car weighing approximately 95,000 pounds—right?

A. Yes, sir.

Q. (Continuing.) —how much of that went to the customer?

A. I would say approximately—would that be sufficient?

Q. Yes.

A. I would say approximately 43 or 44,000.

Q. What happened to that remaining 50,000 pounds?

A. I don't know, but if the invoice had been issued 837 covering it, naturally credit would be given to offset that amount that was not used, but I am not familiar with that transaction.

Q. That 50,000 pounds was not shipped to the customer's plant and then reshipped from the customer's plant?

A. No, it was not.

Mr. Layton: Temporarily, Mr. Examiner, Mr. Cull may be excused, subject to recall.

Trial Examiner Hornor: All right, sir.

(Witness temporarily excused.)

Mr. Layton: I ask for a short recess, Mr. Examiner.

Trial Examiner Hornor: We will take a short recess at this time.

(A short recess was taken.)

Trial Examiner Hornor: Proceed, gentlemen.

Mr. Layton: Mr. Levin, please.

EDWARD LEVIN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Layton.*

Q. Will you state your name, please?

A. Edward Levin.

838 Q. Are you in business?

A. Yes, sir.

Q. With what company?

A. With the Crystal Pure Candy Company.

Q. Whereabouts is that located?

A. 2611 Chicago Avenue.

Q. What position do you occupy with that company?

A. Buying certain raw materials and managing the factory.

Q. Do you have under your supervision and charge the purchase of corn syrup glucose?

A. Yes, sir.

Q. From whom since June, about the middle of June, 1936, have you purchased such corn syrup?

A. From Corn Products Refining Company.

Q. Would you describe the method, the mechanics of how you purchased corn syrup within the period, just in your own words?

A. The Corn Products men from either the warehouse or the office would call up our factory early in the morning, say before we arrive to the office, and inquire about the necessity of a load of corn syrup, what they call a tank wagon. Someone in the factory would answer, either the traffic manager or his assistant, he would walk over to the foreman and ask him how soon he would need a tank load or wagon load of glucose, and between themselves they 839 would decide at a certain hour, and they would deliver at a certain hour. I have nothing to do with when to deliver and how to deliver.

Q. Do you know in what quantities you usually enter those orders with the Corn Products Refining Company? I mean how many at a time usually?

A. Single deliveries.

Q. Single delivery, meaning a single tank car?

A. Not tank car.

Q. I mean tank wagon; excuse me.

A. Tank wagon.

Q. Single tank wagon?

A. Yes, sir.

Q. Do any salesmen of the Corn Products Company call upon you personally?

A. Yes, sir.

Q. Who, do you know?

A. Mr. Art Anderson.

Q. When Mr. Anderson calls do you purchase or enter into any contracts with Mr. Anderson?

A. No, sir.

Q. You do not?

A. No, sir.

Q. What do you talk about, what is the purpose, his purpose in calling upon you, what do you do?

A. Oh, it is more a friendly call, the way the market 840 may be strong or the market may be weak, just talk in general, maybe the ball game or anything else.

Q. Did you place an order say for one tank wagon with him?

A. One tank wagon?

Q. You, personally?

A. Well, I would not have to say send me a tank wagon.

Q. But it goes on through this routine that you described?

A. Yes, we can use a couple more tomorrow, and in fact every day again and again.

Q. How many tank wagons per month would you state was your average of normal requirements?

A. Our normal requirements would be about two tank wagons a day, about. I would say maybe one and a half, maybe two, maybe two and a half, three or four would be the maximum.

Q. It varies from day to day?

A. Yes.

Q. Do you recall ever having entered an order with the Corn Products Company for approximately 1,200,000 pounds of glucose, 1,200,000 pounds on one day?

A. I don't remember that, I can't recollect that.

Q. You do not recall?

A. I cannot recall that.

Q. Having purchased in the way in which you described, do you think it would be likely that you would remem- 841 ber such a large order had it occurred?

A. This morning it came to my knowledge that we did order a large quantity, but how much or how many or how, I don't recollect.

Q. How did it come to your attention?

A. We looked over certain bills this morning and I found that at one time we had purchased more than a day's delivery.

Q. How much more?

A. Quite a bit more. How much I just can't recollect right now.

Q. What records indicated that to you?

A. There were bills paid larger than one day consumption.

Q. Did you find any purchase orders issued by you?

A. No, sir.

Q. Do you, as a matter of fact, give the Corn Products Company any purchase orders?

A. I never give them any.

Q. Do they ever send you any confirmations of telephone conversations?

A. I don't remember, sir.

Q. Do you recall anything about the price of glucose on or about March 25th, 1937?

A. No, sir, I don't.

Q. Do you recall at any time having purchased from the Corn Products Refining Company any corn syrup un-  
842 mixed for delivery in tank cars as distinguished from tank wagons?

A. As I have stated, I found in the file larger bills than it would call for a day's consumption and that perhaps is the question what you are asking, but I don't recollect—

Q. Do you have facilities for the handling and unloading of corn syrup or glucose in tank cars?

A. No, sir.

Q. Railroad tank cars?

A. No, sir.

Q. Have you ever to your knowledge had a tank car shipped to you?

A. To our door?

Q. Yes.

A. No, sir.

Q. Would it be possible to so ship it?

A. No, sir.



Q. Then the likelihood is you would not have ordered it for delivery in that way, isn't that true?

A. I don't know, I don't recollect.

Q. Do you recall any arrangements with Mr. Art Anderson or any other person representing the Corn Products Refining Company, as to the shipment to you in tank wagons in the usual way, but with reference to certain tank cars?

A. Something like it had occurred, but how and why I can't recall, sir, I don't remember.

843 Q. Have you furnished to me, Mr. Levin, by request certain of your original records?

A. Yes, sir.

Mr. Layton: I will ask you to mark this Commission's Exhibit No. 128-A to H, for identification.

(The documents referred to were marked "Commission's Exhibits Nos. 128-A to H, inclusive," for identification.)

By Mr. Layton:

Q. I hand this to you, Mr. Levin and ask you to describe these several exhibits there, referring to them by number, if you will, please. For instance, what is Commission's Exhibit for identification No. 128-B?

I hand you Commission's Exhibit marked for identification and ask you to describe what it is, beginning with this sheet marked 128-B, what is that?

(Passing exhibit to the witness.)

A. Well, this is a tank wagon No. 2—

Q. It is an invoice?

A. It is an invoice.

Q. An invoice from whom?

A. From Corn Products Sales Company to Crystal Pure Candy Company.

Q. Transmitting to you what information, what it is for, in general?

844 A. For a tank wagon corn syrup unmixed.

Q. And it is dated—

A. Dated March 25, 1937.

Q. And what is Exhibit No. 128-C, what is this (indicating)?

A. I would not know what it means, exactly. Maybe this is—

Q. From whom did you receive it?

A. From Corn Products Sales Company.

Q. At the time you received the goods indicated in the invoice?

A. This comes in later by mail. We get one like this when it is delivered (indicating).

Q. Just a minute. This document No. 128-C, shows what?

A. The weight of the glucose, the corn syrup.

Q. And this sheet that is marked 128-D, Mr. Levin, what is that?

A. That is a receiving slip for a load of glucose, for a tank wagon of glucose.

Q. The same one that is referred to on the invoice marked Commission's Exhibit No. 128-B?

A. The same one?

Q. Let us compare them.

A. 8711—yes, that would be the same.

Q. And what is Commission's Exhibit No. 128-E, marked for identification?

845 A. This is also an invoice for tank wagon of syrup received by us.

Q. And the other documents attached and marked Exhibit 128-F?

A. That is the weight.

Q. And G and H are similar documents with relation to the same shipment?

A. Yes, sir.

Trial Examiner Hornor: Show the date of 128-E.

Mr. Layton: I offer this—

Trial Examiner Hornor: Just a minute. Show the date of 128-E.

Mr. Layton: 128-B is dated March 25th; 128-E is dated March 26th.

I offer that in evidence.

Mr. McCollester: May I ask the purpose of it? I do not know that I see its relevancy. I have no objection to it at this stage but I cannot figure out to what issue in this case it is supposed to be directed. I would appreciate counsel stating the purpose of the exhibit, its supposed relevancy to the case.

Mr. Layton: I have in mind introducing a number of exhibits, each one of them documenting the sales and shipments made by the respondents to the Crystal Pure Candy Company from approximately 3-25-37 to 8-2-37, counsel 846 for the respondents having stated that their records with reference to the matter were destroyed.

Mr. McCollester: But what of it? The exhibit, whatever it is for identification—128 for identification shows the price of \$3.09 which is the price shown as of that date on Exhibit

No. 126-H. What does it add to that, that is what I do not see.

Mr. Hier: The purpose of it, Mr. McCollester is to show what documents there are showing the sales, you people having none. One of the questions in issue here is how these orders are entered.

Mr. McCollester: Well, if the purpose is simply to show the documentation practice I have no objection to it, although I do not think that is material in any matter before the Commission.

847 Trial Examiner Hornor: The objection is overruled and it will be received.

(The document above referred to heretofore marked for identification "COMMISSION'S EXHIBIT 128-A to H," was received in evidence.)

Mr. McCollester: I am just trying to save cluttering up the record with a lot of documents that do not prove anything more than we have agreed with you.

Mr. Layton: That can be determined later, what they prove. Mindful of the agreement stated by counsel for the respondents I ask that these exhibits be photostated and that the original be returned to the Crystal Pure Candy Company and that a copy of each of the exhibits be made for the respondents and one for the record.

Is that agreeable?

Mr. McCollester: That is agreeable.

Mr. Hier: That represents, Mr. McCollester, only to 128-B forward.

Mr. McCollester: We do not ask for photostats of the chart.

Trial Examiner Hornor: Just for these.

Mr. McCollester: We are short—we have put in two photostats of which we do not have copies. Off the record.

(There was a discussion off the record.)

848 Trial Examiner Hornor: Let the record show Exhibits 124 and 125 included in that request.

Mr. Hier: I ask for a few minutes recess, Mr. Examiner.

Trial Examiner Hornor: All right, we will take a short recess.

(A short recess was taken.)

Trial Examiner Hornor: All right, go ahead.

Mr. Layton: I offer for identification certain documents and ask that they be numbered appropriately Commission's Exhibits 129-A to K, inclusive; 130-A to E, inclusive; 131-A to O, inclusive; 132-A to K, inclusive; 133-A to J, inclu-

sive, 134-A to H, inclusive, 135-A to K, inclusive, 136-A to M, inclusive, 137-A to E, inclusive, 138-A to E, 139-A to K, inclusive, 140-A to K, inclusive, 141-A to E, inclusive, 142-A to L, inclusive, 143-A to H, inclusive, 144-A to H, inclusive, 145-A to K, inclusive, 146-A to H, inclusive, 147-A to N, inclusive, 148-A to N, inclusive, 149-A to O, inclusive, 150-A to 150-Z-32, inclusive, 151-A to Q, inclusive, 152-A to K, inclusive, 153-A to O, inclusive, 154-A to I, inclusive, 155-A to N, inclusive, 156-A to N, inclusive, 157-A to N, inclusive, 158-A to F, inclusive, 159-A to E, inclusive.

(The documents above referred to were thereupon 849 marked "Commission's Exhibits 129-A to K, 130-A to E, 131-A to H, 132-A to K, 133-A to K, 134-A to H, 135-A to K, 136-A to M, 137-A to E, 138-A to E, 139-A to K, 140-A to K, 141-A to E, 142-A to N, 143-A to H, 144-A to H, 145-A to K, 146-A to H, 147-A to N, 148-A to N, 149-A to O, 150-A to Z-32, 151-A to Q, 152-A to K, 153-A to O, 154-A to I, 155-A to N, 156-A to N, 157-A to N, 158-A to F, 159-A to E," for identification.)

By Mr. Layton:

Q. Now, Mr. Levin, I ask you if these documents are your original records and were supplied to me similarly as was Exhibit No. 128 which you examined?

A. Yes, sir, correct.

Mr. Layton: I offer them in evidence. Any objection?

Mr. McClester: No objection, except the general objection.

Trial Examiner Hornor: The objection is overruled and the documents offered as Commission's Exhibits 129 to 159 with appropriate lettering will be received in evidence.

(The documents above referred to heretofore marked for identification "Commission's Exhibits 129-A to K, 130-A to E, 131-A to H, 132-A to K, 133-A to K, 134-A to H, 850 135-A to K, 136-A to M, 137-A to E, 138-A to E, 139-A to K, 140-A to K, 141-A to E, 142-A to N, 143-A to H, 144-A to H, 145-A to K, 146-A to H, 147-A to N, 148-A to N, 149-A to O, 150-A to Z-32, 151-A to Q, 152-A to K, 153-A to O, 154-A to I, 155-A to N, 156-A to N, 157-A to N, 158-A to F, 159-A to E," were received in evidence.)

Mr. Layton: Your witness.

*Cross Examination by Mr. McClester.*

Q. Mr. Levin, I direct your attention to Exhibit No. 149 for identification, and just by way of illustration the first set

of documents on there that appears to show that you were billed on the 1st of June, 1937, for corn syrup purchased by you from Corn Products Company at a price of \$2.99, is that correct?

(Passing exhibit to witness.)

A. That is correct.

Q. Do you know whether \$2.99 at that time was the tank car price, or do you know what the price situation was?

A. I don't remember.

Q. Do you know what the differential was between the tank car and the tank wagon price?

A. Ten cents a hundred.

Q. Now, in connection with that same shipment as to 851 which the first document is an invoice for \$2.99, were you billed an additional ten cents per hundred pounds?

A. Additional ten cents per hundred pounds?

Q. Yes.

A. I can't very clearly explain.

Mr. Layton: Counsel, we will concede it does so indicate. By Mr. McCollester:

Q. In other words, the price paid by you for that corn syrup, the total price was \$3.09 rather than \$2.99?

A. That is a charge of ten cents, that must be \$2.99 and 10 cents is \$3.09.

Mr. Layton: We concede that.

Mr. McCollester: And that is the tank wagon price?

Mr. Layton: He was charged ten cents more, as you have indicated there.

Mr. McCollester: So that in each instance he was charged the corresponding tank wagon price and not the tank car price.

Mr. Layton: He was charged a differential over the first invoice price upon the delivery being made in tank wagons.

Mr. McCollester: And that was the prevailing differential between the tank car and the tank wagon price.

852 Mr. Hier: What he paid all that time was \$3.09 for 42 degrees in tank wagons.

By Mr. McCollester:

Q. When you purchased glucose from Corn Products during the period covered by the exhibits identified by you, did you know whether or not you were receiving any more favorable price than was accorded to any of your competitors by Corn Products?

A. No, sir.



Mr. McCollester: That is all.

Mr. Layton: Mr. Levin may be excused temporarily. We may want to call him back, I do not know.

Trial Examiner Hornor: All right.

(Witness temporarily excused.)

Mr. Layton: Mr. Kahn.

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ARCHIE KAHN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Layton.*

Q. State your name, please.

A. Archie Kahn.

Q. Are you in business in Chicago?

A. I am.

853 Q. With what company?

A. Crystal Pure Candy Company.

Q. Have you had occasion recently, at my request, to refresh your recollection with reference to certain alleged tank car purchases of corn syrup unmixed from the Corn Products Refining Company and the manner in which you paid for them?

A. I did.

Q. Do you recall how many there were, how many tank cars?

A. According to our records there were seven.

Mr. McCollester: What is the witness' connection with the Crystal Pure Candy Company?

By Mr. Layton:

Q. What is your connection?

A. I am secretary of the company in charge of sales.

Q. Have you been in the habit, prior to June of 1937, of purchasing from Corn Products Refining Company one or two tank cars and paying for them—one or two tank wagons, excuse me, at a time, and paying for them?

A. Well, that was the procedure, yes.

Q. On or about June 8th, 1937, do you know whether or not you paid Corn Products in the neighborhood of \$8,760.00?

A. Yes, we did.

Mr. McCollester: That was what date?

Mr. Layton: Approximately June 8th, 1937.

854 By Mr. Layton:

Q. And with reference to that you have recently refreshed your recollection. You do not know—you would not say as to dollars and cents, but about that sum eight thousand seven hundred dollars and something?

A. That is right.

Q. Do you know how many of these tank cars that we refer to have been delivered to you through shipments in tank wagons at that time?

A. Well, I would say the deliveries had been completed by that time.

Q. On how many?

A. On the first three cars.

Q. And do you recall as to the other cars when payment was made for them?

A. I would say upon completion of delivery.

Q. Made when?

A. I would say they were paid for after deliveries had been completed.

Q. In tank wagons?

A. Tank wagons, yes.

Q. After relatively 95,000 pounds of glucose had been delivered to you in tank wagons you then paid them for the deliveries in tank wagons constituting approximately that 95,000 pounds?

855 A. That is right.

Q. Mr. Kahn, do you have any recollection of the company ever having purchased approximately 1,200,000 pounds of glucose at one time on or about March 25th, 1937?

A. Well, not any more than what Mr. Levin has stated.

Q. You heard him testify?

A. That is right.

Mr. Layton: Mr. Kahn is your witness.

*Cross Examination by Mr. McCollester.*

Q. When you said that you had no recollection other than that of Mr. Levin of the transaction, did you yourself recollect to the extent that he did that there was some large purchase sometime?

A. That is right.

Q. And you are not familiar—do not recall now the details?

A. No, I don't remember anything at all.

Q. Do you recall whether your company found itself at a disadvantage from a competitive angle as compared with your competitors that are able to take glucose in tank cars?

A. Well, there is a saving of ten cents per hundred between the cost of syrup delivered in tank cars as against tank wagons.

Q. And when you paid for these shipments that you 856 have described as the payment of \$8,700 approximately in June, and then the later payment, that was on the tank wagon basis which was ten cents higher than the car-load basis, is that right?

A. That is right. Our records will show that the cartage was separately billed.

Q. I show you Commission's Exhibit No. 149-C and ask you if that is the billing for the additional ten cents?

(Passing exhibit to witness.)

A. That is right.

865 Friday, October 11, 1940 at 9 a. m.

ARTHUR C. SCHRIER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Hier.*

Q. Will you state your name, please?

A. Arthur C. Schrier.

866 By Mr. McCollester:

Q. How do you spell the last name, please?

A. S-c-h-r-i-e-r.

By Mr. Hier:

Q. What is your address?

A. 10431 South Hale Avenue.

Q. Chicago, Illinois?

A. Yes, sir.

Q. You are connected with E. J. Brach and Sons?

A. Yes.

Q. What position do you hold with E. J. Brach and Sons?

A. Assistant purchasing agent.

Q. They are located at 4756 West Kinzie Street, Chicago, Illinois, are they?

A. Yes, sir.

Q. Mr. Schrier, do you recall my being out at the plant of E. J. Brach and Sons the other day and asking to look at your purchasing records?

A. Yes, I do.

Q. Do you also recall that Miss Kerwin had some original records of your company photostated for me?

A. Yes, that's correct.

Q. I will hand you here the documents which have been marked for identification Commission's Exhibit No. 160, entitled "Purchase Order No. 36759," and I will ask 867 you to tell us what record in your plant that is a photostat of?

(Passing document to the witness.)

A. This is a photostat of our Purchase Order, the number being indicated above, to the Corn Products Sales Company, for fifteen cars of corn syrup. The body of the order was written by our clerk, and it was signed by Mr. C. O. Rummelhoff.

Q. Now, Mr. Schrier, let me ask you—

By Trial Examiner Hornor:

Q. Pardon me, but will you give the date of that?

A. It is dated 7-6-36.

By Mr. Hier:

Q. Who was Mr. Rummelhoff?

A. The purchasing agent for E. J. Brach and Sons.

Q. As I understand it, Mr. Schrier, this is a photostat of a carbon copy of the purchase order which you retain in your files; is that correct?

A. Yes and no. That might be an original. I cannot say offhand.

Q. The original is ordinarily sent to the Corn Products, isn't it?

A. Yes, the original is ordinarily sent to the Corn Products Company.

Q. The writing on here which appears below the headings "Quantity", "Size", and "Description", in other words, the part reading "15 cars 43 Crystal Pure Corn Syrup" I understand is put on by one of your clerks, or by someone connected with your clerical staff after delivery is made?

(Passing document to the witness.)

A. Yes, sir.

Q. In other words, these dates down here (indicating) show what?

A. The dates when it was received.

Q. That is, the various cars ordered?

A. That's right.

Mr. Hier: Do you want to see this, Mr. McCollester?

Mr. McCollester: Yes.

Mr. Hier: Here you are.

(Passing document to Mr. McCollester.)

By Trial Examiner Hornor:

Q. Pardon me, Mr. Schrier, but what are your initials?

A. A. C.

Mr. McCollester: May I ask the witness a few questions?

Trial Examiner Hornor: Surely.

By Mr. McCollester:

Q. Mr. Schrier, you say that this document might be a photostat of the original?

A. That is possible, yes.

Q. So you cannot testify that the document, of 869 which this is a copy of a photostat, was ever actually sent to the Corn Products, can you?

A. No, I could not testify to that.

Mr. McCollester: Objection.

Trial Examiner Hornor: Sir?

Mr. McCollester: I make objection to this document going in evidence.

Mr. Hier: Do you want me to go on the witness stand and testify about that?

Mr. McCollester: You could not testify to it. The witness has identified it as having been taken from his files.

Mr. Hier: Yes. May I say something off the record, for a moment, please?

Trial Examiner Hornor: Yes, off the record.

(There was a discussion off the record.)

Trial Examiner Hornor: On the record.

Mr. McCollester: I have no objection on that ground, but there is no proof that it was ever sent to the Corn Products.

Mr. Hier: I examined the original of which this is a photostat. It is a copy. I can testify to that.

Mr. McCollester: But you cannot testify that it was ever sent to the Corn Products.



Mr. Hier: Mr. Examiner, the Respondents' official 870 in charge of their Chicago office says that all of his records have been burnt up, destroyed, or something of that sort, prior to 1938. I believe he so testified.

Now, if the original has been destroyed, why, it seems to me that the document of which this a photostat, and I understand that no argument is made on that point, it seems to me is the next best evidence to be offered.

By Trial Examiner Hornor:

Q. Is the original or a copy of that, Mr. Witness, sent to the Corn Products Refining Company?

A. I cannot answer that without looking at our original records.

By Mr. Hier:

Q. Mr. Schrier, as a matter of fact, you do not make these things out, do you?

A. No, sir.

Q. Those are made out by somebody else over at your company?

A. Yes, sir.

Q. And that is the reason why you cannot testify that the original was sent?

A. Yes, sir.

Q. In the normal course of events, Mr. Schrier, what happens?

A. In the normal course of events the original is 871 sent as a confirmation to the supplier.

Mr. Hier: I think that is sufficient, if the Examiner please.

Trial Examiner Hornor: Can he ascertain from his records whether they were sent?

The Witness: I said I could ascertain whether it was a copy or the original.

Mr. Hier: I think the document is competent, otherwise he will have to go back and make a detailed examination of the records, and that will take quite some time.

Mr. McCollester: I do not think that would get us anywhere. It may be that they make these records up for their own purposes in their own office. I don't know.

I have offered to look in New York to see if we have any receipts for these. If you are making any point as to the dates on which these particular things were sent or received by the Corn Products, I do not think you can prove it by those photostats or by his examining the records now.

Mr. Hier: That is where we take issue. I think we can:  
Trial Examiner Hornor: Somebody in that office should be able to testify whether those things have been sent.

Mr. Hier: I am perfectly willing to enter into an agreement with Mr. McCollester to this effect: That if, 872 when he gets back to New York, he finds the originals they may be brought in and substituted. I do not want to leave the city, then find that he has not the originals.

Mr. Rummelhoff is the one who signs these things, but I did not ask him to come down when he told me that his wife was in the hospital and undergoing an operation. I did not think that the point was sufficient to call a man away under those circumstances.

Trial Examiner Hornor: I will grant an adjournment so you can get that man in here, if you wish.

Mr. Hier: I think the document is proper to be received in evidence.

Trial Examiner Hornor: That is, I will grant a reasonable time.

Mr. McCollester: Could he testify to it, that is the point.

Mr. Hier: I think he could. He is the man who could testify to it, or Miss Kerwin, who makes these out.

The Witness: The name is Irwin.

Mr. Hier: Is the name Irwin or Kerwin?

The Witness: It is Miss Irwin.

Trial Examiner Hornor: Off the record.

(There was a discussion off the record.)

Trial Examiner Hornor: On the record.

Mr. McCollester: I do not want to put any obstacles 873 in the way of proving something here.

Trial Examiner Hornor: I am not criticizing you.

Mr. McCollester: I know you are not; but if these dates here are material, why, I think counsel has to prove his dates by competent evidence.

Will you allow me to ask the witness a few questions at this time?

Mr. Hier: Surely.

By Mr. McCollester:

Q. Mr. Schrier, what do you have to do, as assistant purchasing agent, with the purchase of corn syrup? Just what is your function?

A. Well, if Mr. Rummelhoff is absent from the city, is away on account of illness, or something like that, why, it is my duty to purchase whatever corn syrup is necessary.

Further, the matter of keeping records is under my jurisdiction.

Q. Now, you purchase corn syrup from the Corn Products and from other companies as well, do you,—or is it only from the Corn Products Company?

A. Well, we purchase it from whoever we desire.

Q. You do purchase it from a number of suppliers; is that correct, ordinarily?

A. Yes, that is correct.

Q. Do their salesmen, including the salesmen of the 874 Corn Products, get in contact with you from time to time to ascertain what your requirements are?

A. That is correct.

Q. And when there is a price change, Mr. Schrier, do they communicate with you by telephone, or otherwise, and tell you that there has been a price change?

A. That is correct.

Q. Do they inquire what your needs may be, Mr. Schrier, that you want to cover by that price change?

A. That is correct.

Q. And you tell them what your needs are going to be for that period, do you, after they tell you that there is going to be a price change?

A. Yes.

Q. Is that right?

A. That is correct.

Q. Then after that do you, from time to time, send them any orders giving shipping directions for shipment against those advices that you have given them as to your needs?

A. That is substantially correct.

Q. Is the document which has been marked Commission's Exhibit No. 160, for identification, the form of document you send in giving shipping instructions?

A. No, that is not correct.

Q. What is this?

875 A. That is a purchase order. Now, we might call up on the telephone and give them shipping instructions.

Q. I see.

A. That is merely our own record of the transaction.

Q. That is your record of the transaction?

A. Yes, that is our record of the transaction.

Q. Presumably prior to the making of this record there was some telephone conversation between you and the salesman of the Corn Products?

Mr. Hier: I object to that.

The Witness: I cannot answer that.

By Mr. McCollester:

Q. It might be or it may not have been?

A. Sir?

Q. It may be or it may not have been?

A. That is right.

Q. That may have been a written confirmation by you of an understanding that was reached over the 'phone as to what your requirements might be on the price change?

A. I cannot answer that question. It could be a visitation or a telephone conversation. In other words, I cannot testify to it as just being a telephone conversation.

Mr. Hier: I offer in evidence the document which has been marked Commission's Exhibit No. 160, for identification.

876 Trial Examiner Hornor: Is there any objection?

Mr. McCollester: On the basis of the testimony given by the witness, your Honor, I have no objection to it going in evidence.

Trial Examiner Hornor: It may be admitted in evidence and marked Commission's Exhibit No. 160.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No. 160" was received in evidence.)

Mr. Hier: For the same purpose, if the Examiner please, I offer in evidence the document which has been marked for purposes of identification Commission's Exhibit No. 161.

Trial Examiner Hornor: What is that?

Mr. Hier: It is, likewise, a purchase order, being a photostatic copy.

Trial Examiner Hornor: Is there any objection?

Mr. McCollester: No.

Trial Examiner Hornor: Then it may be received in evidence and marked Commission's Exhibit No. 161.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No. 161" was received in evidence.)

Mr. Hier: I also offer in evidence the document marked Commission's Exhibit No. 162, for identification.

877 Trial Examiner Hornor: Is there any objection?

Mr. McCollester: No.

Trial Examiner Hornor: Then it may be admitted in evidence and marked Commission's Exhibit No. 162.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No. 162" was received in evidence.)

Mr. Hier: I also offer in evidence what has been marked Commission's Exhibit No. 163, for identification. I offer that in evidence as Commission's Exhibit No. 163.

Trial Examiner Hornor: Is there any objection?

Mr. McCollester: No.

Trial Examiner Hornor: It may be received in evidence as Commission's Exhibit No. 163.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No. 163" was received in evidence.)

Mr. McCollester: Let me ask the witness another question.

By Mr. McCollester:

Q. The testimony you have given regarding Commission's Exhibit No. 160, Mr. Schrier, would be equally applicable to the others, would it?

A. Yes, sir.

Mr. McCollester: All right, no objection.

378 Trial Examiner Hornor: They have all been received in evidence. Proceed.

By Mr. Hier:

Q. Now, I will hand you the document which has been marked for purposes of identification Commission's Exhibit No. 164, Mr. Schrier, and I will ask you to tell us what that represents.

(Passing document to the witness.)

A. This document is a sales confirmation sent to us by the Corn Products Company. It is identified as being received by us by means of our time stamp, which is on the face of the document here. (Indicating.)

Q. Let me ask you this: Is there anything else put on that document except the time stamp by E. J. Brach and Sons?

A. To the best of my knowledge that is all there is.

Q. That time stamp you put on—

A. That time stamp is put on all documents that are received in the mail.

Q. That time stamp that is put on represents the time when the document is received by you?

A. That is correct.

Mr. Hier: I offer Commission's Exhibit No. 164, for identification, in evidence.



Mr. McCollester: Have you any extra copies of these documents?

879 Mr. Hier: No, but we will have photostats made, that is, if you can make a photostat of a photostat. I don't know about that.

Trial Examiner Hornor: Is there any objection to Commission's Exhibit No. 164, for identification?

Mr. McCollester: No objection.

Trial Examiner Hornor: Then it may be received in evidence as Commission's Exhibit No. 164.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No. 164," was received in evidence.)

- Mr. Hier: I also wish to offer in evidence what has been marked Commission's Exhibit No. 165, for identification, which is a purchase order and is similar to the others that have already been received in evidence.

Trial Examiner Hornor: Is there any objection?

Mr. McCollester: That is all right. No objection.

Trial Examiner Hornor: Then it may be admitted in evidence and marked Commission's Exhibit No. 165.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No. 165" was received in evidence.)

By Mr. Hier:

Q. Mr. Schrier, the document that has been marked 880 Commission's Exhibit 166, for identification, is similar to the one marked Commission's Exhibit No. 164, is it not?

(Passing document to the witness.)

A. That is correct.

Q. There is nothing put on there by your employer except the mail receipt stamp; is that right?

A. Yes, sir.

Q. Otherwise it represents a photostatic copy of a confirmation received by E. J. Brach and Sons from Corn Products, does it?

A. Yes, sir.

Mr. Hier: I offer Commission's Exhibit No. 166, for identification, in evidence.

Trial Examiner Hornor: Is there any objection?

Mr. McCollester: No.

Trial Examiner Hornor: It may be received in evidence, there being no objection, and marked Commission's Exhibit No. 166.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No. 166," was received in evidence.)

Mr. Hier: I also offer in evidence the document that has been marked Commission's Exhibit No. 167, for identification, which is also a photostat of a purchase order.

Trial Examiner Hornor: Is there any objection?

881 Mr. McCollester: No.

Trial Examiner Hornor: There being no objection it may be received in evidence and marked Commission's Exhibit No. 167.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No. 167," was received in evidence.)

Mr. Hier: Mr. Reporter, just place a note in the record to this effect: That if it is possible to make a photostat from a photostat that copies of those exhibits will be furnished to counsel for the Respondents.

Trial Examiner Hornor: Off the record.

(There was a discussion off the record.)

Trial Examiner Hornor: On the record.

Is there anything further with this witness?

Mr. Hier: That is all.

Trial Examiner Hornor: Is there any cross examination of this witness?

Mr. McCollester: Just one or two questions, please.

*Cross Examination by Mr. McCollester.*

Q. Mr. Schrier, did you personally withdraw the documents which have been received in evidence from your files or did somebody else do that?

882 A. I did not withdraw them, but our clerk, Miss Miller, who has charge of our purchase records, withdrew these records from our files.

I examined the original orders and checked them against the photostats.

Q. Is my impression correct, Mr. Schrier, that these were picked out from a lot of similar documents you have in your files?

A. That is correct.

Q. There were other documents of the same sort with dates on them either shortly prior or shortly after these particular documents that are present here; is that right?

A. I would say that is substantially correct.

Mr. McCollester: That is all.

Mr. Hier: That is all.

Trial Examiner Hornor: Thank you very much. You are excused.

(Witness excused.)

Mr. Hier: I would like to recall Mr. Cull for a few more questions.

o Trial Examiner Hornor: o All right. This witness has previously been sworn.

ALBERT CULL was thereupon recalled as a witness for the Commission and, having been previously duly  
883 sworn, resumed the stand and testified further as follows:

*Direct Examination by Mr. Hier.*

Q. Give your name for the record.

A. Albert Cull.

Q. Mr. Cull, you recall at the last hearing a number of invoices running from the Corn Products Sales Company to the Crystal Pure Candy Company, one of your customers, were introduced into the record here and that some testimony was given and questions asked about the sale of tank cars to that concern.

A. Yes.

Q. Having heard the testimony and having seen those exhibits, Mr. Cull, can you now say that those tank cars, as shown by those invoices, were sold and shipped to the Crystal Pure Candy Company?

A. I did not see the invoices. That is, I did not examine the invoices.

Q. Well, it would take too long to do that.

You also have a customer here in Chicago by the name of the Peanut Specialty Company, have you not?

A. Yes, sir.

Q. They are, I believe, tank wagon buyers also?

A. Yes, sir.

Q. Do they have any facilities at their plant for the  
884 handling of tank cars?

A. No, sir. They operate their own tank wagons. That is, whether they are wholly owned by them, I don't know; but deliveries are usually made to tank wagons that are at their disposal.

Q. You sell glucose to them in tank wagon lots, do you?

A. At our filling station.

Q. And they contract and perform the delivery service?

A. Yes, sir.

Q. Your company's counsel has furnished me with a list of shipments, outside of tank wagons, to the Peanut Specialty Company. Mr. McCollester has such list in front of him.

On that list appears an order, dated 7-6-36, date shipped 8-12-36, being one tank car of No. 3 at a price of \$2.46; and another tank car ordered 7-6-36, date shipped 8-28-36, representing one car—representing one tank car of No. 3, at the same price.

Do you have any knowledge of that transaction?

A. I have no knowledge of that particular transaction except to know that my recollection is that orders of that kind were coming in. Whether we got those particular orders from the Peanut Specialty Company or not, I don't know; but I assume from the records that must be correct.

Q. Mr. Cull, bearing in mind that these people are, according to your own statement, tank wagon buyers, \$85 but have no facilities for the handling of tank cars, would you say that the sale or shipment of these two tank cars to which I have called your attention was handled in the same manner as the Crystal Pure Candy Company tank sales were handled?

A. That would be my guess.

By Mr. McCollester:

Q. But you don't know, do you?

A. I don't know, because, as I explained, I did not have the details of the bulk department at that time under my jurisdiction.

Mr. McCollester: I move to strike out his guess.

Trial Examiner Hornor: The motion is granted and the answer may be stricken.

By Mr. Hier:

Q. Do you have any records in your office which would indicate how this has been handled?

A. I am sorry, but we have no records prior to the beginning of 1937.

Q. Consequently, so far as the Chicago office is concerned, there being no records, and your recollection being uncertain, and Mr. Kirkland being in Mexico, there is available no evidence here so far as your company is concerned, as to how these two tank cars were sold or shipped; is that correct, Mr. Cull?

A. No, because I would say that our salesman 886 might have a recollection of that.

Q. Do you know who your salesman was, Mr. Cull, who handled the account of the Peanut Specialty Company?

A. Yes, sir.

Q. Who was it?

A. Art Anderson.

Q. Art Anderson?

A. Yes.

Q. There are also on here two orders dated 3-25-37, each for one tank car.

A. What was the date?

Q. March 25th, 1937, one of them shipped May 10th, 1937, and—

A. Will you excuse me for just one minute, please?

Q. Yes.

A. Did you say March 25th, 1937?

Q. Yes. That is the date of the order, according to this record which was furnished by your counsel to me.

A. Yes.

Q. One for a tank car shipped 5-10-37 at a price of \$3.04.

A. That is March 25th, you say?

Q. Yes.

A. And shipped when?

Q. May 10th, 1937, to the Peanut Specialty Company.

A. I will have to look at our records on that over in 887 the office. This is not the Peanut Specialty Company's record that I have here.

By Mr. McCollister:

Q. You have not those records here?

A. No. I was looking at the record of the Crystal Pure Candy Company.

By Mr. Hier:

Q. There was another one shipped on June 11th, 1937, at the same price. Do you have any recollection of that transaction, or those two transactions?

A. I have no recollection of it, but I am quite sure we have similar records on this covering the Peanut Specialty



Company beginning in 1937, and which I can get by returning to the office.

Q. If you have a record similar to that, referring to the Crystal Pure Candy Company, would that record show whether tank cars of glucose were actually shipped to and received by the Peanut Specialty Company, or whether such transactions are handled similar to those which you testified about with reference to the Crystal Pure Candy Company?

A. They should give the same detail as the Crystal Pure Candy cars show.

Q. Would it be possible for you to find out about that over the phone, what these details are, Mr. Cull, without going back to the office and getting a similar record, or 888 not?

A. I think so.

Mr. Hier: I wonder if we could have a short recess, Mr. Examiner, in order for the witness to get that information.

Trial Examiner Hornor: Yes, we will recess for ten minutes at this time, gentlemen.

(A short recess was taken.)

Trial Examiner Hornor: The hearing will come to order. You may proceed.

By Mr. Hier:

Q. Now, could you detail into the record, Mr. Cull, having just telephoned your office, what the situation was with reference to the two cars shipped to the Peanut Specialty Company in August, 1936?

A. I telephoned the office and had my order clerk examine the 1937 records for the Peanut Specialty Company, and I have written down the figures which he has given me.

Mr. McCollester: I do not believe that is responsive to the question you were asked. He said 1936.

Mr. Hier: Yes.

The Witness: Oh, did you say 1936?

By Mr. Hier:

Q. I am asking you about the first two cars, Mr. Cull, 889 in 1936.

A. Oh, excuse me.

Q. Did you get that information?

A. Yes. We have no records in our Chicago office. Is that other answer I gave to be scratched out?

Mr. Hier: I imagine we had better strike that out and start all over again.

Trial Examiner Hornor: Yes, it may be stricken.

By Mr. Hier:

Q. I will put it this way:

Mr. Cull, during the recess I understand that you telephoned your office to find out if they had any data over there which would throw any light on the sale and shipment of two tank cars of glucose to the Peanut Specialty Company which were shipped in the month of August, 1936.

A. Yes. We have no records on that.

Q. Have you found any data at all which would explain those two sales and shipments?

A. We have no records in Chicago covering 1936 business. The permanent records, I understand, are kept at our headquarter office in New York.

Q. With reference to the two cars shipped, I believe, one in the month of May and one in June, 1937, Mr. Cull, have you found any data with reference to those?

A. Yes, sir.

Q. What is that?

890 A. Our records begin with January, 1937. I telephoned our order clerk, who read from the Peanut Specialty Company card the following:

A shipment on May 25th—pardon me. An order of May 25th, 1937 covered by Contract 4999, one tank car of 3" C. S. U., our Order No. 19243, billing price \$3.04; shipping date May 10th, 1937, from our Argo plant.

Mr. McCollister: Before you go on any further, Mr. Cull, I think you stated that the order was dated "May 25th, 1937". It should be March 25th, 1937, I believe.

Mr. Hier: Yes, that is right. Let the record show that it should be March 25th, 1937.

The Witness: Yes, March 25th, 1937. The shipping date is May 10th, 1937, from our Argo plant in CCLX 606, contents weighing 95860 pounds. The entry further shows tank wagon applications, as follows:

May 13th	8,820 pounds
May 20th	26,320 pounds
June 5th	26,960 pounds
June 11th	26,660 pounds
June 21st	7,100 pounds.

Mr. Hier: Now, may I interrupt you for just a moment right here, Mr. Cull?

The Witness: Certainly.

By Mr. Hier:

891 Q. These shipments of 26,000 pounds, that would represent how many tanks?

A. About a double tank wagon. They have large tank wagons. About a double wagon. You see, the ordinary weight is about 12,000 pounds, sometimes 10,000.

Q. It represents a double tank wagon or two tank wagons?

A. No, just one, but it is a large sized order.

Q. Go ahead.

A. The record further shows an entry—I will get this date right now—March 25th, 1937, on the same contract number, for one tank car of 3" C. S. U., covered by our Order No. 24078. There are two prices on this. How shall I word it?

Q. Just state what the record shows.

A. At a price of \$3.04 for the major quantity, and \$3.61 for the balance, to be later explained. The shipping date shown is June 11th, 1937, from Argo.

Q. Would you give me the car number?

A. I will get that in a minute.

Q. All right.

A. From Argo in CCLX 539, the contents weighing 96,120 pounds.

The tank wagon applications are shown as follows:

	June 21st	19,750 pounds
	July 2nd	26,430 pounds
892	July 13th	26,670 pounds
	July 16th	23,270 pounds.

That was all at \$3.04, and the balance contained in the July 16th tank wagon delivery of 3,320 pounds at \$3.61.

Mr. Hier: Now, may we go off the record for a moment?

Mr. Examiner, because I want to check something here?

Trial Examiner Hornor: Off the record.

(There was a discussion off the record.)

Trial Examiner Hornor: On the record.

By Mr. Hier:

Q. Do your records disclose any reason for the charge of \$3.61 for the 3,320 pounds?

A. I notice on this that there is four barrels of 3". That might be a bookkeeping calculation. I would say that these figures—may I go off the record while I figure this for a moment?

Mr. Hier: Yes, it is all right with me, if it is all right with counsel and the Examiner.

Mr. McColester: Oh, yes.

Trial Examiner Hornor: Off the record.

(There was a discussion off the record.)

Trial Examiner Hornor: On the record.

The Witness: I would say that they filled up the tank wagon and there was a balance exceeding the extent of 893 the tank car.

Mr. McCollester: I will stipulate that the list of sales furnished to counsel for the Commission shows that on July 16th, 1937 a shipment of four barrels at a price of \$3.61.

Mr. Hier: That is all right. That is agreeable to me.

Trial Examiner Hornor: Let the record so show. Proceed, if there is anything further to ask the witness.

By Mr. Hier:

Q. Now, Mr. Cull, the Walter Birk Candy Company is a customer of yours; is that right?

A. Yes, sir.

Q. Do they buy in tank car lots or tank wagon lots?

A. They buy in tank wagon lots.

Q. Do they have any facilities for handling tank cars?

A. I am quite sure that they have not.

Q. How about the Walter Johnson Candy Company?

A. They are also a tank wagon customer who operate their own tank wagons.

Q. Do you know whether they have any facilities for handling glucose in tank cars?

A. I would make the same answer to that, that so far as I know they have no such facilities.

Mr. Hier: Mr. McCollester, I would like to enter 894 in evidence here, similar to the way we did it the other day, this sheet (indicating), the one you were just looking at.

Mr. McCollester: Is that with regard to the Peanut Specialty Company?

Mr. Hier: Yes.

Trial Examiner Hornor: Has that been marked in any way for identification?

Mr. Hier: No.

Trial Examiner Hornor: You had better have it marked.

Mr. Hier: Will you mark this Commission's Exhibit No. 168 for identification, please?

(The document referred to was marked "Commission's Exhibit No. 168," for identification.)

Mr. Hier: It is stipulated between counsel for the Commission and counsel for the Respondents that the document which has been marked for purposes of identification Commission's Exhibit No. 168, representing sales and shipments

to the Peanut Specialty Company by the Respondents, as furnished to counsel for the Commission by counsel for the Respondents, may be received in evidence as evidence of what the records of the Respondents show.

Trial Examiner Hornor: Is that correct, counsel?

Mr. McCollester: Yes.

Trial Examiner Hornor: The record may so show.  
895 Commission's Exhibit No. 168, for identification, may be received in evidence.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No. 168" was received in evidence.)

Mr. Hier: Mr. Reporter, will you mark this Commission's Exhibit No. 169, for identification, please?

(The document referred to was marked "Commission's Exhibit No. 169" for identification.)

Mr. McCollester: What is that one, for the Birk Candy Company?

Mr. Hier: Yes.

Mr. McCollester: For one car?

Mr. Hier: One order, two cars.

Mr. McCollester: Okay.

Mr. Hier: I would like to offer in evidence the document which has been marked Commission's Exhibit No. 169, for identification, if the Examiner please, under the same stipulation.

Trial Examiner Hornor: Is there any objection to that, Mr. McCollester?

Mr. McCollester: No.

Trial Examiner Hornor: It may be received in evidence and marked Commission's Exhibit No. 169.

896 (The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No. 169" was received in evidence.)

Mr. Hier: Mr. Reporter, will you please mark this Commission's Exhibit No. 170, for identification?

(The document referred to was marked "Commission's Exhibit No. 170" for identification.)

Mr. McCollester: What is that, please?

Mr. Hier: This is with reference to the Walter Johnson Candy Company.

Under the same stipulation I should like to offer in evidence what has been marked for purposes of identification Commission's Exhibit No. 170.



**Trial Examiner Hornor:** Is there any objection?

**Mr. McCollester:** No objection.

**Trial Examiner Hornor:** It may be received in evidence and marked **Commission's Exhibit No. 170.**

(The document referred to, heretofore marked for identification "**COMMISSION'S EXHIBIT No. 170**" was received in evidence.)

**By Mr. Hier:**

**Q.** Now, then, Mr. Cull, since you have been in—I will withdraw that.

**Mr. Cull, who has replaced Mr. Kirkland in your office as being in direct contact with the bulk glucose sales?**

897 **A.** I would say that I replaced him with a man by the name of Tim Clawson. Of course, I am in charge and Mr. Clawson is my assistant.

**Q.** By the way, Mr. Cull, how do you spell that name Clawson?

**A.** C-l-a-w-s-o-n. It is T. C. Clawson. But I have been giving my close attention to everything in connection with the bulk business since that time.

**Q.** Since you have been giving your close attention, as you say, to bulk glucose sales in Chicago to the Confectioners, Mr. Cull, have there been any more, to your knowledge, transactions such as those reflected on the documents and the testimony already given with reference to the Crystal Pure Candy Company?

**A.** You mean selling a concern on a tank car basis, which the industry had done at that time, and making tank wagon applications against it?

**Q.** Yes.

**A.** No, sir.

**Q.** That has not been done since when?

**A.** I would say, to my knowledge, since the latter part of 1938.

**Q.** That is when you became more actively engaged in connection with the details of it?

**A.** Yes, sir.

898 **Q.** That has not been done at all to your knowledge?

**A.** No, to my knowledge that has not been done.

**Mr. Hier:** I believe that is all.

**Mr. McCollester:** Mr. Examiner, may the record show, just to protect our interests, with reference to the exhibits

just received in evidence, that when I stated we had no objection to the authenticity of them—

Trial Examiner Hornor: The record may show that you have a general objection.

Mr. McCollester: Yes, I would like to have the record show a general objection.

Trial Examiner Hornor: The record may show a general objection. That is understood, that you are reserving that.

Mr. McCollester: That I am reserving that general objection, and no other objection.

. . . . .

Trial Examiner Hornor: This is a reconvening of the hearing in Docket No. 3633, Corn Products Refining Company, *et al.*

Mr. Hier: For the purpose of the record, Mr. Examiner, this testimony this morning is on count 2 of the complaint with reference to the advertising allowance or advertising services given to the Curtiss Candy Company, and the first witness we would like to call is Mr. August Hausske, purchasing agent of the Curtiss Candy Company.

Trial Examiner Hornor: All right, sir.

. . . . .

AUGUST F. HAUSSKE was thereupon called as a witness for the Comraission and, having been first duly sworn, testified as follows:

*Direct Examination.*

By Mr. Hier:

Q. Will you give your name to the reporter, please?

A. August F. Hausske.

Q. You reside in Chicago?

A. Yes, I do, or in Oak Park.

Q. What position do you hold with the Curtiss Candy Company?

A. Purchasing agent.

Q. And how long have you been purchasing agent for them?

906 A. Oh, about 15 years or so.

Q. As such, you have either directly purchased, or under your control there has been purchased glucose and dextrose, is that correct?

A. That is right.

Q. When did you first begin buying your dextrose from Corn Products Refining Company or Corn Products Sales Company for the Curtiss Candy Company?

A. In 1936, maybe bought a little bit in 1935.

Q. Are you still buying dextrose?

A. Yes, we are.

Q. Could you give us the annual purchases, that is, I mean by that the purchases by years for 1936, 1937, 1938 and 1939 of dextrose from the Respondents?

A. Yes, I could.

Q. Would you dictate them in the record?

A. 1936 was 1,347,357 pounds; 1937, 2,046,015; 1938, 3,386,433; 1939, 7,090,861.

Q. Now, these figures you have just read out are in pounds, are they not?

A. That is right.

Q. Now, do you have purchases which you have made for the Curtiss Candy Company from these Respondents of I believe it is 43 degree glucose which you use, is it not?

A. That is right.

907 Q. For the same period?

A. These figures probably include 43 and 45 degree too.

Q. At any rate, it is all glucose?

A. That is right.

Q. Would you give them to us?

A. For what?

Q. Well, for 1936, 1937, 1938 and 1939.

A. Total from all purchases, or just—

Q. No, total of your purchases from these Respondents of glucose for those periods?

A. 1938, the first year we purchased from them 3,549,260; 1939, 14,609,138.

Q. Is that in pounds also?

A. That is in pounds also.

Q. Then I understand from you that you bought no glucose from the Corn Products Refining Company or

Corn Products Sales Company during 1936 or 1937, is that correct?

A. That is correct.

Q. Now, then, do you have your total purchases of glucose from all suppliers for the same periods?

A. Yes.

Q. Would you give them to us?

A. 1936 was 22,997,379; 1937, 22,746,549; 1938, 27,808,709; 1939, 24,712,254.

Q. The figure which you have just given for 1938 represents total purchases of glucose by you for the Curtiss Candy Company and includes that amount which you previously testified was bought from the Corn Products Refining Company and from the Corn Products Sales Company?

A. That is right.

Q. And the same is true of the 1939 figure which you just last gave?

A. That is right.

Q. Now these two products were purchased by you as I understand to be used in the candies which the Curtiss Candy Company makes?

A. That is true.

Q. Do you have anything to do whatever with the advertising which the Curtiss Candy Company does?

A. No, sir.

Q. You do not know anything about that at all?

A. No, I do not.

Mr. Hier: I believe that is all.

### *Cross-Examination.*

By Mr. McCollester:

Q. So far as the business of the Curtiss Candy Company is concerned it is engaged in the manufacture and sale of candy?

A. That is right.

Q. You are not in the business of selling dextrose or glucose?

909 Mr. Hier: I object. This man is not competent to testify to that. He is the purchasing agent.

Mr. McCollester: It is proper cross-examination. Counsel asked him if he purchased the glucose and dextrose to be used in candies. I think I can pursue the matter.

Trial Examiner Hornor: Give me that question again, please.

(The question above referred to was read by the reporter.)

Trial Examiner Hornor: The objection is overruled, he may answer.

The Witness: We never sold anything, that is dextrose. By Mr. McCollester:

Q. And this dextrose and glucose that you purchased from the Corn Products, you did not purchase to resell as dextrose or glucose, but to use it as an ingredient in candy, is that correct?

Mr. Hier: I object to that, that calls for a conclusion. Also this man has nothing whatever to do with selling.

By Trial Examiner Hornor: \*

Q. Yours is just the purchasing end of it?

A. Yes, sir.

Trial Examiner Hornor: The objection is sustained. 910 By Mr. McCollester:

Q. You testified I believe on direct examination, in answer to Mr. Hier's question, that you purchased this dextrose and glucose to be used in candies, is that right?

A. That is right.

Q. And that includes the dextrose and glucose that you purchase from Corn Products?

A. That is right.

Q. And that was the sole purpose for which that dextrose and glucose was purchased?

A. Yes, sir.

Q. And when you said to be used in candies, you meant to be used as an ingredient in the manufacture of candy, is that right?

A. That is right.

Q. So far as you know, when you purchased either dextrose or glucose for the Curtiss Candy Company during the years about which you have testified, did you do so pursuant to any understanding that under any arrangement, if there was one, in connection with advertising, your company had undertaken to purchase glucose and dextrose from Corn Products?

A. No, no understanding of that kind at all.

Q. You made these purchases without reference to any understanding regarding advertising?

A. Yes, sir.



911 Q. I notice that there was a marked increase in the year 1939 over the year 1938 in the quantity of glucose which your company purchased from Corn Products. Is it your testimony, referring to your previous answer, that that increase had nothing to do with any arrangement which there may have been for advertising?

A. There is no arrangement for advertising at all.

Mr. McCollester: Will you read that answer, please?

(The answer above referred to was read by the reporter.)

By Mr. McCollester:

Q. Well, then, you mean there is no arrangement for advertising that had anything to do with that increase?

A. In connection with purchases.

Q. So that your answer to my question is that that increase of 1939 over 1938 in your purchases from Corn Products had nothing to do with any arrangement for advertising that there might have been between the companies?

A. That is right.

Q. It was due to some factor entirely apart from any arrangement with Corn Products regarding advertising?

A. Yes, sir.

Mr. McCollester: That is all.

912

*Re-Direct Examination.*

By Mr. Hier:

Q. Have you bought dextrose from anyone else besides Corn Products?

A. In early 1936 we bought some, I think very little in 1935.

Q. How early in 1936?

A. The first couple of months.

Q. Of the year you mean?

A. Of the year 1936.

Q. Prior to September?

A. Yes, it was January and February I think, all of it.

Q. Since September, 1936 have you purchased any dextrose from anyone except Corn Products Refining Company and Corn Products Sales Company?

A. No, we have not.

Q. Is there any substantial difference between the quality and grade of glucose from one refiner and another?

A. No, there is not.

Q. They are practically the same for your purposes, are they not?

A. Practically the same.

Q. How about dextrose?

A. Well, there isn't any other place we can buy it from—

Q. Pardon me?

913 A. You mean dextrose?

Q. Yes, dextrose.

A. I don't know that either. We have only been buying from Corn Products.

Q. Doesn't the American Maize Company sell dextrose?

A. We have never been approached by the American Maize Company.

Q. Doesn't the Clinton Company sell dextrose?

A. I don't know if they do. We have never been asked.

Mr. Hier: That is all.

*Re-cross Examination.*

By Mr. McCollester:

Q. You have never been approached by any of these other companies to sell you dextrose?

A. No, we have not.

Mr. McCollester: That is all.

Mr. Hier: That is all.

(Witness excused)

Mr. Hier: Mr. Schnering.

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OTTO SCHNERING was thereupon called as a witness for the Commission and, having been first duly sworn, was examined and testified as follows:

*Direct Examination.*

By Mr. Hier:

914 Q. Mr. Schnering, you are president of the Curtiss Candy Company?

A. I am.

Q. And how long have you occupied that position?

A. Since the company started.

By Mr. McCollester:

Q. And when was that?

A. 1916, December.

By Mr. Hier:

Q. And you of course, were such in 1936 and since then?

A. Yes.

Q. Are you familiar with the testimony already taken in this case involving your company?

A. Some of it I am, yes.

Q. It will be unnecessary to go over all of it. I would like just to ask you when this arrangement which has been testified to by the officials of Corn Products Refining Company with your company was entered into?

A. 1936.

Q. And about what time in 1936?

A. Shall I go right on in a conversational way and give you the story?

Q. I would rather you would give me the approximate date when the arrangement became operative.

A. September was the start of the campaign.

915 Q. September, 1936?

A. 1936.

Q. Now then, as I understand it from the previous testimony, there was no written contract?

A. There was no written contract.

Q. It was purely an oral arrangement?

A. That is right.

Q. Between you and whom on the part of Corn Products?

A. Mr. Buhrer.

Q. That is John D. Buhrer?

A. That is right.

Q. Vice-president in charge of sales?

A. That is right.

Q. And as I gather from Mr. Buhrer's testimony this arrangement involved the expenditure of a sum of money by the Respondents, the amount to be left wholly to him or some committee of the Respondents for the purpose of advertising dextrose as being an ingredient or constituent of Cartiss candies, is that right, Curtiss Candy Company products, perhaps?

A. Well, you understand that was an arrangement Mr. Buhrer had—

Q. I asked if that is your understanding?

A. That is the way it operated as far as our end was concerned, yes.

916 Q. I see. Now then, what were you obligated to do?

A. We were obligated to do two things. One was to use dextrose in our product with no obligation at all to buy it from any certain company. But we were to use dextrose in our product.

We were also obligated to use the advertising of dextrose in our advertising copy and on our packages.

Q. Now, how is this arrangement worked out?

A. Would you be just a little more specific in that, please?

Q. Do you know the amounts of money which the Corn Products Refining Company or the Corn Products Sales Company have expended upon such advertising?

A. Yes, I do.

Q. Could you give us those figures?

A. In 1936 they appropriated \$100,000.

Q. Was that amount spent?

A. That was approximately spent, I think within a few dollars. 1937 they appropriated \$250,000 and spent approximately that amount. In 1938 they appropriated \$260,000 and spent approximately that amount. In 1939 I think the sum was a like sum, \$200,000.

Q. In 1938 you said it was \$200,000 they appropriated?

A. Yes.

Q. Wasn't that \$250,000 in that year?

A. My memory is that it was \$200,000.

917 Mr. Hier: May we go off the record a moment?

Trial Examiner Hornor: Yes.

(There was a discussion off the record.)

By Mr. Hier:

Q. Now then, all of the candies which you manufacture contain dextrose in some amount, is that right?

A. All that can contain dextrose. There are certain kinds that will not take dextrose in addition to corn syrup, and those of course, we cannot add dextrose to them.

Q. Practically all of them do?

A. Practically all of them do.

Mr. McColester: Would it not be well, if I may just interject a suggestion, in the discussion, to distinguish in your questions, between dextrose as in corn syrup and dry dextrose?

Mr. Hier: I was just about to do that.

By Mr. Hier:

Q. So far I have been talking, and I assume you have in answering, about dextrose in powdered form.

A. That is right.

Q. Now then dextrose or corn syrup also contains a certain percentage of dextrose?

A. That is right.

Q. Do you know about what that percentage is?

A. Pure dextrose about around  $17\frac{1}{2}$  to 20 per cent.

918 Q. Is contained in—

A. Dextrose and maltose combined, about 36 per cent.

Q. I see. Do you use glucose in all of your candies?

A. I believe we do with one exception.

Q. Then, as a matter of fact all of your products contain either dextrose added, that is dry dextrose or dextrose—I mean dextrose contained in corn syrup?

A. That is right.

Q. And your dextrose content, whether coming from one source or the other, varies rather widely in the different range of candies which you make, isn't that right?

A. It does range, yes.

Q. Now, speaking only of the dry dextrose. There was no certain amount to be used in any particular candy or in the whole range of candies under this arrangement, was there?

A. No, there was not.

Q. That was entirely left up to you?

A. That was left entirely up to us.

Q. And is it not true, Mr. Schnering, that speaking of added dextrose only in the dry form, that the range is from about one per cent to something like 99 per cent?

A. No, that is not true.

Q. It isn't?

A. I will answer another way if you want me to.

Q. Yes.

919 A. I do not believe there is any product we have that will run as low as one per cent added, and none that will run as high as 99 per cent.

Q. Do you make a product by the name of Butter Tofey?

A. Yes.

Q. What percentage of dry dextrose do you believe or remember that contains:

A. Well, as I recall, I am not certain, but as I recall it does not contain any dry dextrose.

Q. What percentage of dry or added dextrose does your product N. R. G. contain?



A. I am not sure of the dry, but on the dry and the dextrose in corn syrup combined it will run approximately 90 per cent.

Q. You would say that the dextrose content of your products whether from one source or the other would range from one per cent to 90 per cent, then?

A. One per cent is a little low. I do not think we add to any product only one per cent.

Q. How is this percentage calculated, is it by volume or by weight?

A. It is by weight.

Q. By weight?

A. Yes.

Q. And is that finished weight or by weight when it is mixed?

920 A. It is by weight when it is finished, taking out the moisture that is in the corn syrup and other moistures that are in the batch.

Q. Now then, prior to this arrangement, or prior to the operating date of this arrangement with the Respondents, your company was engaged in national advertising on a very heavy scale, was it not?

A. Yes, we were.

Q. And the change which was made was principally the addition of the words "Enriched by dextrose" or "Rich in dextrose" to your advertising, your then current advertising and later advertising, was it not?

A. Well, that of course was the basis of the theme of the campaign, but it was much more extensive than that. Our entire copy was changed, adding to the campaign the fact that the candy was rich in dextrose, helping to make it more energizing, helping to relieve fatigue and so forth.

Q. The purpose of the campaign was to bring to the public, was it not, that the public could buy and get the benefit of dextrose in your candies?

A. That is right.

Q. By eating your candies?

A. Yes.

921 Q. The campaign, however, did not involve any addition to the scope of your advertising? It involved mainly an additional expense in changing over or changing the layouts and additional words, isn't that correct?

A. That was all that was involved at the start.

Q: Now, as I understand you, what you have said here that you were not obligated to spend any given amount on advertising of one candy or another candy or of all candies, is that correct?

A: That is correct.

Mr. McCollester: You mean obligated by the arrangement?

Mr. Hier: Yes, by the arrangement.

The Witness: That is correct.

By Mr. Hier:

Q: Referring to your company only, Mr. Schnering, it has a wide national distribution of the products which it sells, doesn't it?

A: It does.

Q: Would you say that it had the widest national distribution?

A: I would say as wide as any.

Q: As wide as any?

A: Yes.

Q: How does it rank in the field, largest, second largest, third largest?

922 A: I cannot answer that, Mr. Hier.

Q: Would you say that your company was one of the most, or the most aggressive in the field?

A: Well, I think it is as aggressive as any. You have to make due allowance for modesty here.

Mr. McCollester: Here is your chance for a little advertising.

By Mr. Hier:

Q: Do you know any company manufacturing a similar line of candies which is bigger than you are from the standpoint of distribution, I mean?

A: No, I do not.

Q: What percentage of the advertising, national advertising of these various candy products which you put out would you say was done by your company?

A: As compared with the industry?

Q: Yes.

A: Mr. Hier, I will have to guess at that because those figures are not available.

Q: Just approximately.

A: From my impression over the past ten years I would say Curtiss is almost equal to all the others in the advertising field.

Q. In other words, Curtiss has done about 50 per 923 cent of all advertising?

A. Over a period of years. One company may have a very extensive campaign, run it one year, a year and a half or two years and then they lop off, but we have continued our advertising right straight through.

Q. With whom do you compete? You mentioned other concerns, and you have been drawing comparisons here with them. With whom do you compete on your line of candies?

A. Well, our line is mostly package candies, that is one cent candies and five cent candies.

Q. Yes.

A. So we compete with all manufacturers of products in that field.

Q. Well, I am not quite as familiar with the candy field as I should be perhaps.

Mr. McCollester: A little modest.

By Mr. Hier:

Q. I would like to ask you if, for instance, you compete with Nutrine Candy Company of this city?

A. Not as much as many others, because they are more in the bulk field.

Q. How about E. J. Brach & Sons?

A. Some of their items, more than Nutrine, but not as much as other companies.

Q. M. J. Holloway Company, are they a competitor of yours?

924 A. Yes, they would be more a competitor because they make five cent items and penny items.

Q. How about the Chase Candy Company of St. Joseph, Missouri?

A. Locally, yes. They make some package items.

Q. When you say locally, you mean locally down there?

A. In that district. There are only very few manufacturers—maybe I can help here.

Q. All right.

A. There are only very few manufacturers in our field who are national, who can be found in all markets.

Q. Can you give us a few of the names?

A. Mars Candy Company would be one, this is leaving out the chocolate field, of course. O Henry would be another, it has rather wide distribution.

Q. Where are they located?

A. They are in Chicago. Walter Johnson of Chicago. Schutter Candy Company of Chicago; Clark of Pittsburgh. I do not want to hurt anybody's feelings by leaving them out here.

Q. Well, that is just a few we will say. Now, you testified, Mr. Schnering, a while back that one of the two things which you were obligated, or felt yourself obligated to do under this arrangement was to use dextrose in your advertising copy.

925 A. That is right.

Q. Now, how was that done, describe how you did that?

A. Well, at the very foundation of the campaign of course was the placing on all of our packages, our wrappers for our individual pieces, on our boxes and our cartons, the phrase either "Rich in dextrose" or "Enriched with dextrose." And then devoting enough space on the wrapper to tell and describe what dextrose is so the public could become familiar with the description of dextrose.

By Mr. Layton:

Q. May I interrupt for a moment?

A. Yes, indeed.

Q. In the use of those words "Enriched by dextrose" or "Rich in dextrose", what did that convey to your mind? Did it convey the addition of what we have been referring to here as dry dextrose or did it also refer to the addition of dextrose in the form in which it is in glucose?

A. In every case to use the phrase "Rich in dextrose" we added a considerable quantity of the dry dextrose that you are talking of. In other cases where, because of the nature of the candy we would expect to add but very little dextrose, we used the phrase "Enriched with dextrose." Does that answer your question?

Q. Well, did you have a standard of content to use the phrase "Rich in dextrose", a standard of dextrose content before that phrase was used?

A. At the start we did not have.

Q. You did not?

A. We did not have a standard, but we developed one gradually as we went along.

Q. Now, this question: Does that standard—was that standard wholly satisfied after it was arrived at wholly by the addition of dry dextrose or by dextrose from other sources such as glucose? For instance, let me phrase it

hypothetically so we do not get into formulas. If you set a standard of say 10 per cent did that mean that 10 per cent was in the form of dry dextrose or was part or some of it satisfied by glucose?

A. I see what you mean now. No. In the first place, our original basis for reaching a point at which we felt we could use the phrase "Rich in dextrose" we took the fruits for example that were the richest in dextrose and then exceeded that amount in our candies, and in that case called them "Rich in dextrose."

Q. I do not want to push it too far—

A. I have a second point to my answer. I meant to give which I think will complete it. And then we added dry dextrose in those cases sufficiently at the start to bring up the quantity of the dextrose content to exceed the percentages that I have referred to.

927 Q. Would you make a statement that in no case you relied upon the dextrose content of glucose to satisfy the standard of the statement of "Rich in dextrose" or "Enriched by dextrose"?

A. To the best of my memory, yes.

Q. That you did not rely?

A. We did not rely. We added dry dextrose.

By Mr. Hier:

Q. I was asking you, Mr. Schnering, about how you proceeded to carry out this term of advertising "Rich in dextrose," and you had gotten down to the point where you put it on the wrappers and the box wrappers, and where else did you put it?

A. And on the cartons.

Q. Yes.

A. We put it on all of our window strips, we put it on our stationery, even on our envelopes. In every bulletin to our organization, even on our trucks, on our window transfers, decals we call them. In our newspaper advertising or magazine advertising, bulletin board advertising. Every place, painted boards on walls, every place where we could get.

By Mr. McCollester:

Q. Your messenger boys that you have running around the football games and so on?

928 A. On the back of the coats, is that what you mean?

Q. Yes.



A. On vendors in these various concessions. In fact, there wasn't a place that was left out.

Mr. Hier: Please mark this Commission's Exhibit No. 171, for identification.

(The document above referred to was thereupon marked "Commission's Exhibit 171," for identification.)

By Mr. Hier:

Q. I hand you herewith what has been marked for identification, Mr. Schnering, as Commission's Exhibit No. 171; and ask you if that is a sample of a wrapper for one of your products known as Baby Ruth?

(Passing exhibit to witness.)

A. It is.

Mr. Hier: I would like to offer that in evidence. I assume there is no objection.

Mr. McColester: No objection.

Trial Examiner Hornor: It will be received in evidence.

(The document above referred to heretofore marked for identification "COMMISSION'S EXHIBIT 171" was received in evidence.)

Mr. Hier: Mark this Commission's Exhibit No. 929 172-A, B and C, for identification, please.

(The documents above referred to were thereupon marked "Commission's Exhibit 172-A, B and C," for identification.)

By Mr. Hier:

Q. I am handing you herewith what has been marked for identification as Commission's Exhibit No. 172-A, B and C, and ask you what that is?

(Passing exhibit to witness.)

A. That is what we call a magazine advertisement.

Q. Magazine advertisement?

A. Yes.

Q. And this slip upon which the mark is made gives the names of the magazines in which that same advertisement appeared, is that correct?

A. I assume that it does, yes.

Mr. Hier: Will you so stipulate?

The Witness: I cannot recall those magazines, all of them.

Mr. Porter: I will stipulate.

Mr. McColester: I will accept the stipulation as far as the Respondents are concerned.

Mr. Hier: It is so stipulated.

I offer Commission's Exhibit No. 172-A, B and C.

Trial Examiner Hornor: It will be received in  
930 evidence.

(The documents above referred to heretofore marked for identification "COMMISSION'S EXHIBIT 172-A, B AND C," were received in evidence.)

931 Mr. Hier: Will you mark this Commission's Exhibit No. 173-A and B, for identification?

(The document referred to was marked "Commission's Exhibit No. 173-A and B," for identification.)

By Mr. Hier:

Q. Handing you herewith what is marked for identification as Commission's Exhibit No. 173-A and B, will you please tell us what that is?

(Passing exhibit to the witness.)

A. That is a magazine advertisement.

Q. Magazine advertisement of the Curtiss Candy Company?

A. Of the Curtiss Candy Company.

Mr. Hier: I offer that in evidence.

Trial Examiner Hornor: There being no objection it will be received in evidence.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT NO. 173-A and B," was received in evidence.)

Mr. Hier: Will you mark this Commission's Exhibit No. 174, for identification.

(The document referred to was marked "Commission's Exhibit No. 174," for identification.)

By Mr. Hier:

Q. Handing you what is marked for identification Commission's Exhibit No. 174, I will ask you what that is?

932 (Passing exhibit to the witness.)

A. That is our Baby Ruth box wrapper.

Q. Baby Ruth box wrapper?

A. Wrapper. This is wrapped over the cardboard box.

Mr. Hier: I offer that in evidence, Mr. Examiner.

Trial Examiner Hornor: There being no objection it will be received in evidence.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT No. 174" was received in evidence.)

Mr. Hier: Will you mark this Commission's Exhibit No. 175 for identification?

(The document referred to was marked "Commission's Exhibit No. 175," for identification.)

By Mr. Hier:

Q. Handing you herewith what is marked for identification as Commission's Exhibit No. 175, I will ask you, what that is?

(Passing exhibit to the witness.)

A. That is a newspaper advertisement of Jolly Jack, Curtiss Jolly Jack.

Mr. Hier: I offer that in evidence, Mr. Examiner.

Trial Examiner Hornor: If there is no objection it will be received in evidence.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT NO. 175" was received in evidence.)

933 Mr. Hier: Will you mark this Commission's Exhibit No. 176, for identification, please?

(The document referred to was marked "Commission's Exhibit No. 176" for identification.)

By Mr. Hier:

Q. I will ask you the same question with reference to the paper marked Commission's Exhibit No. 176, for identification.

(Passing exhibit to the witness.)

A. That is the box wrapper of the Curtiss Jolly Jack.

Mr. Hier: I offer that in evidence, Mr. Examiner.

Trial Examiner Hornor: If there is no objection it will be received in evidence.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT NO. 176" was received in evidence.)

Mr. Hier: Will you mark this Commission's Exhibit No. 177, for identification?

(The document referred to was marked "Commission's Exhibit No. 177" for identification.)

By Mr. Hier:

Q. Handing you Commission's Exhibit No. 177, for identification, I will ask you to state what that is.

(Passing exhibit to the witness.)

A. That is the individual bar wrapper of our Curtiss  
934 Butterfinger candy bar.

Mr. Hier: I offer that in evidence, Mr. Examiner.

Trial Examiner Hornor: There being no objection it will be received in evidence.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT NO. 177" was received in evidence.)

Mr. Hier: Will you mark this Commission's Exhibit No. 178-A, B and C, for identification?

(The document referred to was marked "Commission's Exhibit No. 178-A, B and C," for identification.)

By Mr. Hier:

Q. Handing you Commission's Exhibit No. 178-A, B and C, I will ask you what they are.

(Passing exhibit to the witness.)

A. That is a magazine advertisement of Butterfinger candy.

Q. And 178-A is what?

A. That is a list of the magazines.

Q. In which that same advertisement appeared?

A. Yes.

Mr. Hier: I offer that in evidence.

Trial Examiner Hornor: There being no objection it will be received in evidence.

935 (The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT NO. 178-A, B AND C," was received in evidence.)

Mr. Hier: Will you mark this Commission's Exhibit No. 179-A and B, for identification?

(The document referred to was marked "Commission's Exhibit No. 179-A and B," for identification.)

By Mr. Hier:

Q. I ask you the same question with reference to the documents marked Commission's Exhibit No. 179-A and B.

(Passing exhibit to the witness.)

A. That is a magazine advertisement of Curtiss Butterfinger candy bar.

Mr. Hier: I offer that in evidence, Mr. Examiner.

Trial Examiner Hornor: There being no objection it will be received.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT NO. 179-A AND B," was received in evidence.)

Mr. Hier: Will you mark this Commission's Exhibit No. 180, for identification.

(The document referred to was marked "Commission's Exhibit No. 180" for identification.)

By Mr. Hier: -

Q. I ask you the same question with reference to 936 Commission's Exhibit No. 180.

(Passing exhibit to the witness.)

A. That is the box wrapper of Curtiss Butterfinger candy bars.

Mr. Hier: I offer that in evidence.

Trial Examiner Hornor: There being no objection it will be received.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT NO. 180" was received in evidence.)

Mr. Hier: Will you mark this magazine as Commission's Exhibit No. 181-A; page 51 as 181-B and page 44 as 181-C and 45 as 181-D, for identification.

(The documents referred to were marked "Commission's Exhibits Nos. 181-A through 181-D, inclusive," for identification.)

By Mr. Hier:

Q. I am handing you herewith Time magazine for October 7th, 1940, marked Commission's Exhibit No. 181-A, for identification, with page 51 marked for identification as Commission's Exhibit No. 181-B and ask you if that is an advertisement of your company?

(Passing exhibit to the witness.)

A. That is an advertisement of our company, our Curtiss Baby Ruth candy bar.

937 Q. This advertisement here, Commission's Exhibit No. 181-B is of the same type as the exhibits which we have been introducing in the record here so far?

A. Will you explain what you mean by type?

Q. This is an advertisement of your candies as being rich in or enriched by dextrose, and is part of the same campaign, I believe you referred to.

A. That is right, except of another year's series. In other words, this is our 1940 series.

By Trial Examiner Hornor:

Q. That is Commission's Exhibit No. 181-B?

A. Yes.

By Mr. Hier:

Q. Did you publish and pay for this Commission's Exhibit No. 181-B?

A. That Mr. Hier would have to be referred to the books of the Miller Company, Hedwig Miller Company or our books. -I could not say from memory.



Q. From the layout of the advertising and what appears upon there, what is your best judgment on that?

Mr. McCollester: I object to his judgment, it is a question of fact.

Trial Examiner Hornor: The objection is sustained, if he does not know.

Mr. Hier: All right, if he does not know.

938 By Mr. Hier:

Q. Well, referring again to Commission's Exhibit No. 181-B, I will ask you if to your knowledge you have ever published and paid for an advertisement of that sort?

A. Yes, we have.

Q. Mr. Schnering, I will ask you to look at pages 44 and 45 of the October 7th, 1940 issue of Time which have been marked for identification Commission's Exhibit 181-C and 181-D, and ask you what that is?

(Passing exhibit to the witness.)

A. This is an advertisement of the product dextrose.

Q. Do you know whose advertisement it is?

A. It is signed Corn Products Refining Company.

Q. Do you recognize that advertisement?

A. I have seen it before, yes.

Q. Is that an advertisement that was representative of other advertisements made by that company, with whom you have this arrangement?

A. They run a series of these in Time and in Fortune.

Q. So that you can identify that as an advertisement of Corn Products Refining Company?

Mr. McCollester: He cannot identify it any more than it has Corn Products name on it.

The Witness: They would not dare to sign it if it were not their advertisement.

939 By Mr. Hier:

Q. Yes, I know, but I mean you have kept familiar with this advertising campaign that the two of you engaged in?

A. Yes, indeed, I follow the advertising.

Q. And based upon the following of that advertising which was done in this campaign, as you call it, would you say that was part of the advertising paid for by Corn Products Refining Company?

A. This is an advertisement—

Mr. McCollester: I object to this as not the proper way to prove that the Corn Products paid for that advertisement.

Mr. Hier: Well, I am not so much interested in whether they paid for it at this moment as I am—

Trial Examiner Hornor: Is this advertisement a part of the program of which your company and the Corn Products Company are parties to an agreement?

The Witness: No, it is not.

By Mr. Hier:

Q. How do you know that?

A. Because this is an advertisement purely of dextrose not tied in with our products at all.

Mr. Layton: What is that answer?

The Witness: This is not tied in with our products at all.

940 Mr. Layton: Off the record a minute.

(Discussion off the record.)

Mr. Hier: I will offer what has been marked Commission's Exhibit No. 181-A and 181-B in evidence.

Trial Examiner Hornor: Is there any objection?

Mr. McCollester: No objection.

Trial Examiner Hornor: There being no objection it will be received in evidence.

(The document referred to, heretofore marked for identification "COMMISSION'S EXHIBIT NO. 181-A AND 181-B," was received in evidence.)

Mr. Hier: Now then off the record a moment.

Trial Examiner Hornor: Off the record.

(Discussion off the record.)

Mr. Hier: Would you mark this Commission's Exhibit No. 182-A and B.

(The document referred to was marked "Commission's Exhibit No. 182-A and B," for identification.)

Mr. Hier: Mark this Commission's Exhibit No. 183-A, B, and C, for identification.

(The document referred to was marked "Commission's Exhibit No. 183-A, B, and C," for identification.)

Mr. Hier: Mark this Commission's Exhibit No. 184-A and B, for identification.

941 (The document referred to was marked "Commission's Exhibit No. 184-A and B," for identification.)

Mr. Hier: And mark these four sheets Commission's Exhibits Numbers 185, 186, 187 and 188, for identification.

(The documents referred to were marked "Commission's Exhibits Nos. 185, 186, 187 and 188," for identification.)

Mr. Hier: Mr. Examiner, pursuant to agreement with counsel for Respondents I offer in evidence the documents marked for identification as Commission's Exhibits Numbers 182-A and B, 183-A, B, and C, 184-A and B, 185, 186, 187 and 188, as representative samples of broadcasts and advertising matter appearing in magazines from time to time, paid for by the Corn Products Refining Company.

Trial Examiner Hornor: If there is no objection they will be received.

Mr. McClester: ~~No objection.~~

Trial Examiner Hornor: They will be received in evidence.

(The documents referred to, heretofore marked for identification "Commission's Exhibits 182-A and B, 183-A, B, and C, 184-A and B, 185, 186, 187 and 188," were received in evidence.)

By Mr. Layton:

Q. Mr. Schnering, handing you Commission's Exhibit No. 174, which I believe you identified as a wrapper for boxes containing a given quantity of Baby Ruth bars—

A. I did.

Q. In order that we may see what change took place with reference to that, could you tell us how and in what respect that differs in general from the one that you theretofore used? I mean before this arrangement with the Corn Products Company.

(Passing exhibit to the witness.)

A. Prior to the campaign starting in 1936, the fall of 1936, we did not have this message of "Rich in dextrose the sugar your body uses directly for energy."

Q. Which appears—

A. Which now appears on this exhibit.

Q. In the hands of this young man, marked "N.R.G.", is that true?

A. Nor did we have this little figure "N.R.G." prior to that campaign. Nor did we have the description of the ingredients of the product nor the description of dextrose as appearing on this exhibit.

Q. In other respects then the paper, the layout and that sort of thing is essentially the same as it was before?

A. The general way. We change our boxes slightly from time to time.

Q. Yes.

A. But in a general way, yes.

943 Q. Is this wrapper that we are talking about, Commission's Exhibit No. 174, is it more expensive than it was before due to changes that you have enumerated?

A. No, I would not say that the wrapper itself is more expensive.

Q. And without reviewing this same matter with reference to the other Commission's exhibits which you identified as wrappers, would you say approximately the same thing is true as to them, that is, changes that have been made?

A. Do you mean due to the addition of dextrose?

Q. Yes.

Q. No, there has been no increased cost.

Q. And the only change that has been made in those similarly with the one we have been talking about is the addition of these references to dextrose?

A. In a general way, yes.

Q. Yes.

A. But we do change our boxes even for campaigns that we are running.

Q. In other words, sometimes you change your forms and layouts even without reference to any new ingredient or anything of that kind?

A. We do for a limited quantity of production, yes.

Mr. Hier: May we go off the record for a moment?

Trial Examiner Hornor: Yes, off the record.

944 (There was a discussion off the record.)

Mr. Hier: Mr. Examiner, I would like to offer in evidence at this time by agreement with counsel certain sections of an act of the legislature of the State of Illinois entitled "Illinois Retailers' Occupation Tax Act" approved June 28th, 1933, effective July 1st, 1933, as amended bearing the caption "An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption."

Section 1 thereof, the first paragraph reading—

Mr. McCollester: Mr. Examiner, before counsel reads I think I should state on the record that I have not agreed that he may offer this. I have agreed—

Mr. Hier: That is right.

Mr. McCollester: (Continuing)—that if the statute which he is going to read and the regulations thereunder are ruled to be admissible I will permit them to be put into the record in this way rather than involving the necessity of calling

an expert witness to prove the statutes of the State of Illinois.

I do object, however, to the Illinois statutes as being entirely irrelevant and immaterial to this proceeding. I cannot see how the interpretation of the laws of the United States can in any way depend upon an Illinois statute or any regulations made by Illinois authorities under that 945 statute.

Mr. Hier: My statement was too broad. The agreement I had with Mr. McCollester was that the statute subject to his objection for relevancy and materiality could be put in by simply reading it rather than putting a lawyer on the stand and having him testify that there was such a statute.

Trial Examiner Hornor: All right. I will overrule the objection.

Mr. McCollester: Exception, please.

Trial Examiner Hornor: It will be noted.

Mr. Hier: "Section 1. 'Sale at retail' means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price shall be deemed to be sales."

Section 2 of the Act reads as follows:

"A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent (3%) of the gross receipts from such sales in this State of tangible personal property made in the course of such business prior to July 1st, 1940

and two per cent (2%) of the gross receipts from such 946 sales after June 30, 1941. However, such tax is not

imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State."

Section 12 of said Act, first paragraph:

"The Department is authorized to make, promulgate, and enforce such reasonable rules and regulations relating to the administration and enforcement of the provisions of this Act as may be deemed expedient."



Article 2 of the Rules and Regulations relating to the Retailers' Occupation Tax Act issued by the Department of Finance of the State of Illinois, revised October 1, 1939, reads:

"The test of a sale at retail is whether the sale is to a purchaser for use or consumption and not for resale in any form as tangible personal property. A sale is made at retail when it is made to a person who does not purchase the goods for resale either in the form or condition in which purchased, or made over or changed into or included in some form of tangible personal property. Sales of goods which, as ingredients or constituents, physically enter into and form part of tangible personal property for resale by the buyers are not within the Act. If a sale is made of goods which are for resale by the buyer as anything 947 other than tangible personal property such sale is a sale at retail within the provisions of the Act."

That is agreed to, Mr. McCollester, that may be offered in this manner?

Mr. McCollester: I agree that that is a correct statement of the sections of the law and regulations.

Mr. Hier: Are you prepared to—

Mr. McCollester: I would like to have read, however, the balance of Article 2 of the Rules and Regulations, or at least the immediately following three paragraphs.

Mr. Hier: That is perfectly all right with us.

Mr. McCollester: Then immediately following what Mr. Hier has read there appears the following in the rules and regulations:

"In general, the tax is intended to be measured by receipts from a sale which constitutes the last actual transaction prior to ultimate use or consumption.

"The quantities of goods sold or prices at which sold are immaterial in determining whether or not the sale is at retail within this Act. Example:

"Sales of goods which as ingredients or constituents physically enter into and form part of tangible personal property sold by the buyer are not sales at retail. It makes no difference that the goods are resold in a different 948 form or condition.

"To illustrate, sales are made to different individuals or corporations for the purpose of manufacturing ice cream from milk, cream, sugar, extracts and various other constituents. These various constituents are bought for resale

by the ice cream manufacturer. They physically enter into and form a part of the ultimate commodity that is resold. The final sale of the ice cream for use or consumption is the sale at retail. This final sale may be made by the manufacturer directly to the consumer, in which event such manufacturer incurs liability for the tax.

"The manufacturer of the ice cream, in this example, may require machinery, freezers, fuel, power, ammonia or ice and similar equipment and supplies, the sales of which to such manufacturer are sales at retail. They are used or consumed in the production or manufacture of the ice cream. They do not physically enter into, or, as ingredients or constituents, form a part of the product sold. They are purchased for use or consumption and not for resale within the meaning of the Act.

"If a purchaser buys tangible personal property for disposition in any manner other than by sale, the sale of such goods to such purchaser is a sale at retail."

That completes Article 2 of the regulations.

Mr. Hier: Off the record a moment, please.

949 Trial Examiner Hornor: Off the record.

(There was a discussion off the record.)

By Mr. Layton:

Q. Mr. Schnering, of the total raw materials used, approximately what percentage is dextrose in one form or another, that is dry dextrose or from glucose or other sources?

A. Approximately 12 to 13 per cent.

Q. Of that 12 to 13 per cent what percentage of the dextrose is derived from glucose?

A. Approximately 40 per cent.

Q. And what percentage of the 12 or 13 per cent is derived from dry dextrose?

A. Outside of the maltose used in chocolate and milk, placed in those products by the manufacturers of those products, it is approximately 59 per cent.

Q. And that leaves about one per cent of the 12 or 13 per cent which is derived from other sources such as what?

A. Chocolate and milk, that is correct.

By Mr. Hier:

Q. These percentages here refer to all of your products on a general average?

A. That is the percentage against the raw materials.

By Mr. Layton:

Q. Do you want to make a statement as to how the interpretation of those figures should be modified as to these 950 figures being wet weights or anything of that kind, Mr. Schnering?

The Witness: Off the record a moment?

Trial Examiner Hornor: Off the record.

(There was a discussion off the record.)

By Mr. Layton:

Q. Do you have in mind how you would like to modify that?

A. The percentages given are percentages of dextrose in all forms against the total weight of raw materials consumed.

Mr. McCollester: In other words, those percentages are not percentages of the dextrose to the weight of the finished candy?

The Witness: No.

Mr. Hier: That is all.

*Cross-Examination.*

By Mr. McCollester:

Q. Mr. Schnering, if I understand correctly your testimony, prior to this arrangement in 1936 you had not shown or featured the use of dextrose as an ingredient in your candies, in your various forms of advertising?

A. We had not.

Q. At that time, prior to this arrangement, was dextrose somewhat under a cloud, so to speak, or was there doubt as to what the public would think about featuring dextrose 951 as an ingredient in candies?

A. Yes, there was.

Q. When the proposition of what turned out later to be this arrangement was first broached to you, or after it was first broached to you, did your company make extensive investigations as to the possibility in the first place of using dry dextrose in your products, as to the effect of that use on your products?

The Witness: May I have this off the record, please?

Trial Examiner Hornor: All right.

(There was a discussion off the record.)

Trial Examiner Hornor: On the record.

Mr. McCollester: Will you read my question, please?

(The question above referred to was read by the reporter.)

The Witness: Yes, we did.

952 By Mr. McCollester:

Q. You conducted extensive experiments did you not, substituting dextrose for sucrose or for some other sweetening ingredient in your candies?

A. We did.

Q. Your candies at that time, that is in the early part of 1936, had already acquired a wide market, and the trade names associated with them had become things of great value to your company, isn't that so?

A. They had.

Q. Now, what have you to say as to whether in entering into this arrangement, which, as you have testified, obligated you to use dextrose in your candies and to advertise or feature the use of dextrose, what have you to say as to the risk which your company ran in venturing into that project?

Mr. Hier: I object to that, Mr. Examiner, I think that is wholly immaterial. It is what happened.

Mr. McCollester: This is one of the things that did happen.

Mr. Hier: That is a speculative matter now.

Trial Examiner Hornor: What is the question, please?

(The question above referred to was read by the reporter.)

Mr. Hier: We have asked nothing relative to his 953 motives for entering into the arrangement or what he thought about it or what he considered or anything else. We are simply interested in the arrangement.

Mr. McCollester: This goes, Mr. Examiner, to what each party got out of the arrangement, what was the stake in it. I think it is part of the consideration.

Trial Examiner Hornor: The objection is sustained.

Mr. McCollester: May I have an exception?

Trial Examiner Hornor: Noted.

By Mr. McCollester:

Q. Did you, Mr. Schnering, have to reprint your wrappers and make new dies, and reprint all of your advertising material in order to carry it into this dextrose feature?

A. We did.

Q. And that involved considerable expense, did it not?

A. It did.

Q. I want to be sure that the record is very clear on this point: The arrangement when entered into and as continued down to the present time has not involved any undertaking on the part of Corn Products to your company to spend any particular sum for advertising in any year or at any time, has it, any definite sum?

A. Nothing planned in advance except late in each year we plan expenditures for the coming year.

Q. But if those expenditures as planned are not carried out by Corn Products there is no breach of any obligation to you, is there?

A. None at any time.

Q. And the same is true insofar as your company is concerned, you have not obligated yourself to Corn Products to spend any particular amount for advertising, have you?

A. No, we have not obligated ourselves at any time.

Q. Likewise as a condition of entering into this arrangement and featuring dextrose in the advertising, you have not obligated yourself in any way to buy dextrose or glucose, or any quantity of dextrose or glucose from Corn Products?

A. We have not.

Q. You are entirely free to buy those from any producer?

A. We are.

Q. What you have just testified that you are under no obligation to buy any dextrose or glucose from Corn Products by virtue of this advertising arrangement, was true not only at the beginning of the arrangement, but it has been continued and is true during the entire period, is that not so?

A. It is.

Q. You testified that there were two things that you were obligated to do under this arrangement. The first one was to use dextrose in your candies. Now, you understood, did you not, that when the proposition of this arrangement was put up to you it had as its aim stimulating the sale of dry dextrose, is that correct?

A. That is correct.

Q. And therefore, when you testified that you became obligated as part of the arrangement to use dextrose in



your candies, what you meant was you were obligated to use dry dextrose?

A. That is right.

Q. However, in connection with your advertising in determining whether you could properly advertise your candies as rich in dextrose, is my understanding correct that you have considered both the dextrose content derived from glucose and that derived from the dry dextrose?

A. That is right.

Q. But those candies have contained dry dextrose?

A. They have.

Mr. McCollester: I think that is all.

Mr. Hier: No other questions.

Trial Examiner Hornor: All right, thank you very much, sir.

(Witness excused.)

Mr. Hier: Off the record, please.

Trial Examiner Hornor: Off the record.

(Discussion off the record.)

956 Trial Examiner Hornor: We will adjourn subject to five days' notice.

(Whereupon, at 12:10 o'clock P. M., of Tuesday, October 15th, 1940, the hearing was adjourned, to be resumed upon five days' notice.)

961 Wednesday, November 13, 1940, at 10 A. M.

Trial Examiner Hornor: Reconvening in Docket No. 3633, Corn Products Refining Company, et al.

Mr. Hier is present for the Commission.

Mr. Hier: May the record show this is a reconvening by agreement?

Trial Examiner Hornor: Very well. Present, Mr. Frank Hier, attorney for the Commission; Mr. Parker McCollester, of Lord, Day & Lord, 25 Broadway, New York, and Mr. Frank H. Hall, of 17 Battery Place, New York, New York, appear for the respondents.

The hearing is being held under and by a waiver of formal notice, and by agreement of counsel for both sides.

Mr. Hier: May we have a short recess to discuss a few matters, your Honor?

Trial Examiner Hornor: Yes.

(A five-minute recess was taken.)

Trial Examiner Hornor: The hearing will come to order.

Mr. Hier: First of all, I would like to stipulate with counsel for the respondents, that on the sales of dextrose by respondents to the Curtiss Candy Company, as appearing on various exhibits in the record for the years 1936,

1937, 1938, 1939, the respondents paid no taxes levied 962 under the provisions of the Illinois Retailers' Occupational Tax Act.

Is that correct?

Mr. Hall: That is admitted.

Mr. McCollester: Subject to objection as irrelevant.

Trial Examiner Hornor: Objection overruled, and the stipulation will be received in the record.

Mr. Hier: The next thing is the stipulation in the record that respondents sold dextrose under their trade name of Cerelese to the following candy companies, and in the following amounts, for the years 1936, 1937, 1938, 1939.

Mr. McCollester: Off the record.

Trial Examiner Hornor: Off the record.

(There was a discussion off the record.)

Trial Examiner Hornor: Proceed.

Mr. Hier: E. J. Brach and Sons of Chicago, Illinois, for the first six months of 1936, 4190 bags.

For the year 1937, 7910 bags.

For the year 1938, 2825 bags.

For the year 1939, 2375 bags.

Nutrine Candy Company of Chicago, Illinois.

For the first six months of 1936, 14 bags.

For the full year 1937, 368 bags.

963 For the full year 1938, 1495 bags.

For the full year 1939, 1923 bags.

M. J. Holloway Company, Chicago, Illinois: for the first six months of 1936—

Mr. McCollester: When you say "six months of 1936," you mean the last six months?

Mr. Hier: I beg your pardon; for the last six months. In each case where I have referred to the six months of 1936, it is for the last six months of 1936.

Mr. McCollester: I just want the record to be straight.

Mr. Hier: So do I.

M. J. Holloway Company, Chicago, Illinois, last six months, 1936—1245 bags.

For the full year 1937—4350 bags.

Full year 1938—3205 bags.

Full year 1939—175 bags.

Chase Candy Company, St. Joseph, Missouri.

Last six months of 1936—775 bags.

For the full year of 1937—4590 bags.

For the full year 1938—1755 bags.

For the full year 1939—2535 bags.

Mr. McCollester: Off the record.

Trial Examiner Hornor: Off the record.

964 (There was a discussion off the record.)

Trial Examiner Hornor: Proceed.

Mr. Hier: Paul Beich Company, Bloomington, Illinois.

For the last six months of 1936—800 bags.

Full year 1937—1215 bags.

For the full year 1938—1626 bags.

For the full year 1939—1615 bags.

The Shotwell Manufacturing Company, Chicago, Illinois.

The last six months of 1936—200 bags.

For the full year 1937—1545 bags.

For the full year 1938—1455 bags.

For the full year 1939—1788 bags.

Mr. McCollester: Off the record.

Trial Examiner Hornor: Off the record.

(There was a discussion off the record.)

Trial Examiner Hornor: Proceed.

Mr. Hier: It is also stipulated and agreed upon that a bag of Cerelese or Dextrose contains one hundred pounds net.

Further, that the above sales of Dextrose constitute a part of the sales made by Respondents of Cerelese or Dextrose to candy manufacturers in the United States.

Mr. McCollester: Off the record.

965 (There was a discussion off the record.)

Trial Examiner Hornor: Proceed.

Mr. Hier: It is further stipulated that respondents have entered into no arrangement identical with or similar to the arrangement between them and the Curtiss Candy Company as appears in the testimony in the record with the above-named candy manufacturers, other than Curtiss, since June 19, 1936.

Mr. Hall: I will stipulate to that.

Mr. Hier: At this time, I offer in evidence Exhibits marked for identification at the last hearing at Chicago, being Commission's Exhibits No. 181-C and 181-D, with

the stipulation with counsel that the advertisement shown by these exhibits will constitute these exhibits, and furthermore, was an advertisement of the respondent and paid for by it.

Trial Examiner Hornor: "Off the record.

(There was a discussion off the record.)

Trial Examiner Hornor: Proceed.

Mr. Hier: Commission's Exhibit 181-A, which has been received in evidence is a magazine: namely, "Time", for the month of October 7, 1940, or rather, the week ending October 7, 1940.

That Exhibit has been received in evidence and presumably forwarded to the Docket Section from Chicago, 966 Illinois. The exhibit is the one that contains pages 44 and 45, which were marked for identification at the last hearing in Chicago, Illinois, as Commission's Exhibits for identification purposes, Nos. 181-C and 181-D. These latter two pages: namely, Exhibits 181-C and 181-D, were not offered nor received in evidence at the last hearing in Chicago, Illinois, although the index of that hearing, in error, so indicates, and are now offered and received in evidence.

The Exhibit 181-A contains Exhibits 181-C and 181-D, for identification and is not present at this hearing, but it is presumably in the hands of the Docket Section at Washington, D. C.

Trial Examiner Hornor: The Exhibits so offered and stipulated will be received in evidence, and the Docket Section is authorized to give it the official numbers.

[The documents referred to, heretofore marked for identification "COMMISSION'S EXHIBITS 181-C AND 181-D," were received in evidence.]

\* \* \*

LINUS C. COGGAN was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

975 Cross-Examination by Mr. McCollester:

Q. Were all of these loans such as they were, Mr. Coggan, made after investigation of the financial soundness of the borrower and all made because the loans were believed to be financially sound loans?

A. That is true.

Q. In connection with any of them, was there any con-

*Re-Direct Examination.*

dition or understanding that the borrower was to purchase products from Corn Products Refining Company?

A: Not on any loans made since or subsequent to 1936. By Mr. Hier:

Q. That brings up one question, Mr. Coggan. I want to ask you this: subsequent to 1936, was there outstanding and in force an agreement with the Edgar P. Lewis Company of Boston, Massachusetts, requiring them or obligating them to buy their products or their requirements from you as a condition of the loan made prior to 1936?

A. Well, I think the loan to which you refer, there may have been an understanding in that respect, was paid off, before 1936.

Q. You think there were several loans to the Lewis Company?

A. Yes. We made loans, I think, as far back as 1933 to the Lewis Company.

976 Q. Then it is your recollection, is it, that as of and since June of 1936, there was outstanding no loan payable from the Lewis Company which had attached to it as a condition, an agreement by them to purchase their products or requirements from you?

A. I could not tell you without checking the records, but that is my best recollection.

985 Monday, February 17, 1941 at 2 P. M.

FRED MUELLER was thereupon called as a witness for the Respondents and, having been previously duly sworn, testified as follows:

*Direct Examination.*

By Mr. McCollester:

Q. Your name is Fred Mueller?

A. It is.

Q. You are the same Fred Mueller that has been previously sworn and testified in this proceeding as a witness for the Commission?

A. That is right.

Q. Mr. Mueller, at the hearing in this proceeding in Chicago, evidence was offered for the Federal Trade Com-



mission in the shape of testimony and exhibits relating to sales in the spring of 1937 to various buyers in Chicago who customarily purchased in tank wagon lots, and purchased c. s. u. in tank wagon lots, and did not have private sidetracks of sales to those concerns in tank cars and tank car lots.

Do you know, and if so, will you state why your company at that time sold to these buyers in tank car lots?

A. Yes.

Q. Why?

986 A. To meet the competitive condition.

Q. Have you examined the records of your company for the purpose of refreshing your recollection on that subject as to the reasons for your sales at that time in tank car lots and tank wagon lots, as set forth in my previous question?

A. Yes. I made up a memorandum at that particular time, and I just took it out of the files.

Q. Have you brought with you that memorandum?

A. Yes.

Q. Was that a memorandum which you now find in your files, in searching the files for the purpose of refreshing your recollection?

A. That is right.

Q. Can you state whether or not that memorandum was an original memorandum made by you at the time that it bears date?

A. Yes, sir.

Q. It does?

A. It does.

Mr. McCollester: May that be marked as Respondents' Exhibit No. 1 for identification?

The Witness: That particular memorandum bears my signature, which was put on at that particular time.

Trial Examiner Hornor: The document referred to, consisting of a single sheet, typewritten on one side, may  
987 be marked as Respondents' Exhibit No. 1 for identification.

(The document referred to was marked "Respondents' Exhibit 1," for identification.)

By Mr. McCollester:

Q. You say that the exhibit which has been marked as Respondents' Exhibit No. 1 for identification, was made by you, personally, at the time that it bears date?

A. That is correct.

Q. And the statements therein, were they or not true at that time?

A. Absolutely. They were true.

Mr. McCollester: We offer that in evidence as Respondents' Exhibit No. 1, in evidence.

Trial Examiner Hornor: Any objection?

Mr. Hier: Just a moment, Mr. Examiner. I object to this, your Honor, on two grounds:

First: It is purely hearsay, and a self-serving declaration, or amounts to being purely a self-serving declaration;

Second: It is, as you can see from reading it, Mr. Examiner, a reflection of hearsay of what was told to or what was heard by, or what was said to this witness, by whom; it is not apparent.

Trial Examiner Hornor: Do you wish to be heard on it, Mr. McCollester?

Mr. McCollester: Surely; that is, if you wish me to 988 reply to it.

First of all, as to characterizing it as a self-serving declaration, your Honor, I will say that it was obviously made long before the present proceeding was even thought of, and therefore, the claim that it is a self-serving declaration, I do not think can be substantiated, because we claim that it had no relationship to this proceeding.

As to its being hearsay, obviously, the law contemplates that a seller may meet competition and prices made by his competitors.

Obviously, the prices at which his competitors are selling, or his knowledge; that is, the seller's knowledge of the prices at which his competitors are selling, is, by its very nature, hearsay, since the only means by which he can know it is from what somebody told him.

That, I think, is enough to make it admissible and material in this proceeding.

And I offer it as corroborative of the witness' testimony that the goods were sold as they were, to meet competition. It seems to me that it should be received by the Commission for what weight it can have, as the best evidence that is available to the seller as to the situation at that time.

Mr. Hier: If your Honor please, that is just the 989 point: first of all, this is not a matter for documentary evidence. It is a matter for this witness' recollection of what he said, did; or how he acted during the time.

Now, that document might be competent if the witness' credibility, or veracity were attacked by us, by way of corroboration only. But, it cannot be admissible at this time because he is here to testify orally as to what happened.

I have no objection if the witness wishes to testify about the matters covered therein, and he may use this document to refresh his recollection, in so doing, if he desires. However, I do not think it is properly admissible as documentary evidence.

Mr. McCollester: Well, I am perfectly willing, if your Honor please, to have it in the record for the convenience of the parties as a document from which the witness has refreshed his recollection. He has testified directly here to that point.

Mr. Hier: I did not make myself clear, I presume.

I object to its going into the record whether he reads it or whether it is put in physically. I have no objection, if, under cross-examination or otherwise, he wishes to look at it and refresh his recollection as to a detail.

Trial Examiner Hornor: - I sustain the objection.

Mr. McCollester: Mr. Examiner, I will try to 990 qualify the document further by additional questions.

Trial Examiner Hornor: Proceed.

By Mr. McCollester:

Q. Mr. Mueller, for what purpose did you write the document which has been marked Respondents' Exhibit No. 1 for identification?

A. To justify the position which I took at that time, which was somewhat irregular in that it was, in fact, it was irregular to ship tank cars to tank wagon buyers, and I wanted to go on record with the company as to why it was being done.

Q. Was it made for the purpose of transacting the regular business of your company?

A. Yes, sir.

Q. Was it made to establish a record as of that time with regard to these transactions?

A. That is correct.

Q. And it has been kept since that time in the permanent records of your company?

A. Yes, sir.

Q. In the first instance, was it made for the purpose of obtaining a permanent record of your company, and for being such a record?

A. That is true.

Mr. McCollister: I renew the offer.

Trial Examiner Hornor: It will be received. The 991 objection is overruled, and it will be received as a record only.

(The document referred to, heretofore marked for identification "Respondents' Exhibit 1," was received in evidence.)

By Mr. McCollister:

Q. Mr. Mueller, now going to another point—

Mr. Hier: If your Honor please—

Trial Examiner Hornor: Yes, Mr. Hier.

Mr. Hier: If your Honor please, just a moment. I wish to object further to this exhibit and move that it be stricken from the record.

Trial Examiner Hornor: I will hear you.

Mr. Hier: This document is obviously a matter which has been gotten up to justify this peculiar course of conduct or action that has happened within the company. This is not a regular company record by any manner or means. It is purely a memorandum by which I apprehend that the witness intended to justify to his company, perhaps, certain acts and conduct which took place on his part, and therefore, it would fall in the province of a private record of this witness, made by him and then placed on file with the company, but certainly under no circumstance could be considered one of the regular books and records of the company such as a cash book, or a journal, or a ledger, or any books of that sort, which are contemplated by the rule to which Mr. McCollister has referred.

Therefore, I think that this exhibit should be stricken from the record.

Mr. Hall: I do not think it is that kind of a record at all.

Mr. Hier: He has just stated that he got this up to refresh his memory, and to refresh his recollection, and a document which is gotten up to refresh his recollection is an irregular document, and he says that it concerns an irregular transaction. It is certainly not a company document in any sense of the word.

Mr. McCollister: Well, now, wait a minute. Do you mean that a document made up to explain an unusual transaction is not a document which would come within the regular course of conduct of a business?

By Mr. McCollester:

Q. That was the whole purpose of this, was it not, Mr. Mueller?

A. That is right.

Mr. Hier: The document is not addressed to any company, if your Honor please, or to any company official, or to any company, itself. In fact, it is not addressed to anyone. It is an irregular and unusual memorandum which was put in the office files by the witness, himself, as I

993 see it.

By Mr. Hier:

Q. By the way, was this in the company's files or your files?

A. I took this from my own files.

Mr. Hier: Further objection on that ground.

By Mr. Hall:

Q. Your files are the company files?

A. My files are the company files.

Trial Examiner Hornor: I will change my ruling and Respondents' Exhibit No. 1 for identification, which was received in evidence, is now stricken from the record. I misunderstood the previous statement.

[The document referred to, heretofore marked "Respondents' Exhibit 1," in evidence, was withdrawn from the record, and returned to counsel for the Respondents.]

By Mr. McCollester:

Q. Mr. Mueller, at this time, in the spring of 1937, was this privilege of buying in tank car lots or quantities available to tank wagon purchasers in the Chicago area, to all tank wagon purchasers that wanted it?

A. Yes.

Mr. McCollester: You may cross-examine.

### *Cross-Examination.*

By Mr. Hier:

994 Q. Mr. Mueller, you said that this was an irregular occurrence in the history of your company since you have been with it; is that correct?

A. That is, prior to that time?

Q. Prior to that time.

A. That is right.



Q. Now, then, you wish the Commission to understand that prior to March 25, or May 10, 1937, I do not know which date the document has on it—

Mr. McCollester: May 10.

By Mr. Hier:

Q. May 10, 1937, Corn Products Refining Company and Corn Products Sales Corporation at no time in any area or with any customer, sold or billed a sale of tank car glucose to a customer, which glucose was subsequently delivered by tank wagons?

A. Well—

Q. Did you hear the question?

A. I did.

Q. I see.

A. No. I did not intend to convey that. We did make a sale in 1936 to a buyer in Chicago in tank wagons—

Q. (Interposing) July, 1936?

A. I think August, tank wagons of a tank car, to, a tank wagon buyer.

995 Q. Yes.

A. We did that to meet competition.

Q. To whom was that?

A. Peanut Specialties Company.

Q. To meet whose competition?

A. Union.

Q. Will you please explain what you mean by that?

A. The Union Company had shipped several tank cars to Peanut Specialties Company, and we met that condition, and in order to meet that condition, we also shipped tank cars of glucose to a tank wagon buyer.

Q. Now, by the "Union Company," do you mean the Union Starch and Refining Company located at Granite City, Illinois?

A. Yes, sir.

Q. Right across from St. Louis?

A. Yes, sir.

Q. And your statement is that they shipped several tank cars to Peanut Specialties Company in August, 1936?

A. No, not in August, they shipped them in May, I believe it was.

Q. In May of 1936?

A. Yes, and then a couple of tanks later than that.

Q. Later than that?

A. I do not know the dates, offhand.

**Q. How were those shipped?**

**996 A.** As I understand it, they were shipped in tank cars to these filling stations in Chicago, and Union then picked out these goods; or rather, I should say, picked up these goods with their own tank wagons—no, not Union, I should say, Peanut Specialties Company picked up the goods with their own tank wagons.

**Q. What?**

**A.** As I understand it, they were shipped to the warehouse of the Union Starch and Refining Company, or their filling station, in Chicago, and then the Peanut Specialties Company picked up the goods with their own tank wagons.

**Q. How do you know that?**

**A.** Information from the buyer.

**Q. From the buyer?**

**A.** That is correct.

**Q. What person in the Peanut Specialties Company told you that?**

**A.** I do not remember just exactly who it was.

**Q. Can you think of his name?**

**A.** I think it was Joe Lavazario, I think it was.

**Q. Will you tell us how to spell his name, please?**

**A.** John, John, I believe it is, John Lavazario, L-a-v-a-z-a-r-i-o, I think it was.

**Q. You say Mr. John Lavazario of the Peanut Specialties Company told you that he had purchased several tank cars in May, and then in July or August of 1936—**

**A.** Not in May.

**Q. In July or August, 1936, from the Union Starch and Refining Company, Granite City, Illinois, which tank cars were shipped to some Chicago warehouse, and were subsequently delivered to them in tank wagon lots by the Union Starch and Refining Company's tank wagon?**

**A.** No, sir. I did not say that.

**Mr. Hall:** Just a minute, Mr. Examiner, may we be off the record for a minute?

**Trial Examiner Hornor:** We will take a five-minute recess.

(A five-minute recess was taken.)

**Trial Examiner Hornor:** Gentlemen, come to order, please. You may proceed.

By Mr. Hier:

Q. Will you answer the question, please?

A. I am sorry. I have forgotten the question.

Q. I will repeat it for you: You say that Mr. John Lavazario of the Peanut Specialties Company told you that he had purchased several tank cars in either July or August of 1936 from the Union Starch and Refining Company of Granite City, Illinois, which tank cars of glucose were shipped to some Chicago warehouse or filling station of the Union Starch and Refining Company, and subsequently delivered to John Lavazario in tank wagon lots by the Union Starch and Refining Company tank wagons?

A. Well, as I explained to you before, I explained how they took delivery of these tank cars. I got the information from Mr. John Lavazario. Of course, I was not there.

Q. All of this information you have given us about these tank wagon deliveries of tank cars, you say were sold, you got from John Lavazario of the Peanut Specialties Company?

A. Also through our Chicago office. I got it both ways.

Q. That was from your Chicago operating salesmen, would you say?

A. That is right.

Q. In August of 1936, you sold how many tank cars to Peanut Specialties Company, deliveries of which were made out of tank wagons?

A. I believe there were two.

Q. Two tank cars, deliveries of which were made by tank wagons?

A. Yes.

Q. Any other customers?

A. I do not recall any back of 1936. That is a long time ago. I would have to check my records.

Q. And this is the first instance where Corn Products Refining Company sold glucose in tank car billing and then made delivery in tank car lots?

999 A. Do you mean in tank wagon lots?

Q. I beg your pardon. I meant to say in tank car billing and then made deliveries in tank wagon lots.

A. To the best of my recollection.

Q. You would not say that they had not done it before that?

A. No.

Q. They might have?

A. I am not sure.

Q. As a matter of fact, they had been doing it for a long time, had they not?

A. No.

Q. Prior to that time?

A. No.

Q. They were not?

A. Not to my knowledge.

Q. Now, then, how about the fall of 1936, were any such sales made then by the Corn Products Refining Company in that manner?

A. Not to my recollection.

Q. When was the next time that this was done by the respondents?

A. I believe in that spring of 1937, it was done more or less in general by us.

Q. That is the next time the Corn Products Refining Company did that?

1000 A. I would say yes.

Q. And do you remember where it was done?

A. I—

Q. Or with whom it was done?

A. Do you mean at Chicago?

Q. Yes. For the moment, I will take Chicago.

A. Yes.

Q. State the name of any customers of the Corn Products Refining Company with whom that was done at Chicago in the spring of 1937.

A. I know several of them, several of them, among whom were the N. J. Holloway Company, and Walter Burke, and Crystal Pure Candy Company, and about four or five others.

Q. Walter Johnson?

A. Walter Johnson.

Q. Walter Burke?

A. I mentioned Walter Burke.

Q. The Commercial Company?

A. I do not remember them. I do not remember the Commercial Company.

Q. It is impossible, of course, Mr. Mueller, is it not, to sell a tank car to any of these concerns you have mentioned, is it not?

Mr. McCollester: What do you mean, it is impossible?

It would be possible to sell a tank car to anybody, 1001 I should think.

The Witness: No, no, it is not impossible.

Mr. Hier: I do not make myself clear, it is apparent.  
By Mr. Hier:

Q. All of these companies you have mentioned are so located that they cannot accept delivery of a tank car of glucose; they have no railroad siding for it to be delivered upon?

A. That is correct.

Q. So that it is impossible to sell and deliver a tank car of glucose to any or all of these concerns; is it not?

A. You cannot deliver it on their own siding, but you can deliver it through our warehouse, as we did in these specific instances.

Q. But that is not a sale and delivery of a tank car of glucose, is it?

A. That is not the customary way.

Q. What is the customary way?

A. To ship a tank car to a buyer that is on a siding and he takes delivery right at the siding.

Q. Now, then, will you tell us, Mr. Mueller, why it was, if this practice was engaged in by your company, to meet competitive conditions that you have testified to here, why the invoice was made by the Corn Products Sales Corporation for one tank car of glucose and sent to the customer and then separate invoices were subsequently made 1002 out for delivery charges of the glucose to the customer in tank wagon lots?

A. Those tanks were shipped to our warehouse and unloaded into our storage tanks. And as deliveries were made to the customers, we sent the invoices to cover the product.

Q. That is true?

A. Yes.

Q. Now, then, let me ask you this, in your ordinary course of dealing with the Crystal Pure Candy Company, and the Holloway Company, and Walter Burke, and Walter Johnston, and several other Chicago located concerns who cannot accept delivery in tank car lots, your regular procedure is to send them an invoice for one tank wagon lot, or two tank wagon lots, whatever they purchase at a time, which invoices they pay, and which invoices include a ten-cent delivery charge, ten cents per hundred weight delivery charge?



A. Yes, sir.

Q. That is true, is it not?

A. That is true.

Q. And that is the course your company has regularly followed for tank wagon delivery?

A. Yes.

Q. And why is it, in March of 1937, April, May, in June of that year, and again going back to 1936, you made out invoices for tank car deliveries and shipped in tank wagon deliveries, and invoiced to the tank wagon buyers?  
1003 Why was this done?

A. Well, the tank cars shipped to those buyers were loaded and held on the siding until these customers were ready to take delivery.

Q. This was a change in the fall?

A. In what way?

Q. Previously, let us say in February, 1937, your records show a number of tank wagon deliveries of glucose to the Peanut Specialties Company, do they not?

A. Yes.

Q. Several of those in February?

A. Yes, I believe that is so.

Q. And then your invoices showed one tank wagon or two tank wagons of glucose?

A. Yes.

Q. Now, why, in March, April, and May of that same year, did you change from that, from billing them in that manner, over to the form of billing which showed on the order that you were selling and delivering to them tank cars, when, in fact and in truth, the delivery was being made in tank wagon lots to these people, and in fact they could not receive it in any other way because they had no railroad siding on which to receive a tank car of glucose?

A. Our customers did buy tank cars and we billed the tank cars, and made out the bill to cover the tank cars which were billed to them, because when they bought  
1004 those tank cars, it was due to a rise in price.

In other words, they bought tank cars and we billed them with tank cars.

Q. You say your customer bought tank cars?

A. Yes, sir.

Q. Don't you know, as a matter of fact, Mr. Archie Kahn; the buyer for the Crystal Pure Candy Company never

bought a tank car of glucose in his life? You know Mr. Archie Kahn?

A. I know him very well, but that is not a correct statement.

Q. That is not a correct statement?

A. No.

Q. You say that he has purchased tank cars of glucose?

A. Oh, yes. He has purchased tank cars and he has purchased tank wagon lots.

Q. I call your attention, Mr. Mueller, to Commission's Exhibit No. 150-B, which is a photostatic copy of Corn Products Sales Company invoice to the Crystal Pure Candy Company; is it not?

A. Correct.

Q. And that exhibit reflects a sale of one tank car; No. 12 Confectionery Crystal No. 2 Corn Syrup in CCLX 542; is that right?

A. Yes, sir.

1005 Q. CCLX 542 is the number of the tank car owned by Corn Products Refining Company; is it not; one of their tank cars?

A. Correct.

Q. Does that exhibit reflect that that glucose was shipped from Argo, Illinois, which is the location of one of your plants where you produce corn syrup?

A. Argo is the place of origin.

Q. That exhibit is an indication of a shipment from Argo, one of your plants, from which your company ships, does it not, into the Chicago territory?

A. That is correct.

Q. That plant is within some twenty odd miles of Chicago, is it not?

A. That is correct.

Q. That exhibit covers a shipment of a tank car of glucose, does it not, and it covers a shipment in your standard way for a tank car buyer, does it not?

A. That is true.

Q. And the standard method of shipment is to ship from your plant at Argo, as in this case, where?

A. Into the buyer.

Q. In to the buyer. That is the standard way?

A. Yes, sir.

Q. Then, what does this mean down here, this statement which reads in part, "To Crystal Pure Candy Com-

1006 pany, care of Corn Products Sales Company, care of Chicago Warehouse?"

A. Shipped to our warehouse for unloading.

Q. Where was it?

A. Where was it what?

Q. Where was it unloaded into?

A. Unloaded into our storage tanks.

By Mr. Layton:

Q. Mr. Mueller, I want to ask you a few questions.

A. Yes.

Q. I want to ask you about your statement that these cars were held on the siding until delivery was requested. Do you mean that the tank cars are held, or that the tank wagons are held, or just what is held?

A. The tank wagons make the delivery. Tank wagons make the delivery to these plants in question here.

Q. Then the tank cars are not held on the siding until tank wagon lots are ordered out of this warehouse in Chicago, are they?

A. The tank cars are held on our siding at Argo, and then when the buyer wanted delivery of these tank cars, he would order them shipped to our warehouse, and we deliver to them with our tank wagons.

Q. I just want to get these things straight; at what siding are these tank cars held?

A. Argo, Illinois.

1007 Then they come on to Chicago, Illinois?

A. Yes.

Q. To Chicago, then what is done with them?

A. They go into our storage tanks at the warehouse.

Q. That was true with reference to CCLX 592, is that not so?

A. To the best of my recollection, yes. Is that the car number?

Q. I beg your pardon, CCLX 542.

A. To the best of my recollection, yes.

By Mr. Hall:

Q. That was the general situation in that regard?

A. That was the situation that applied, but I cannot say whether this particular tank went through our warehouse or not, but that was the general situation. I am not undertaking to answer you as to any particular car, but I can tell you the general procedure.

By Mr. Hier:

Q. Now, when the glucose is put in your vat, it goes in there as forty-two degrees Baume glucose?

A. Yes.

Q. So that, that glucose that goes into that vat, could not be identified as that particular earload of glucose with any more particularity than I could pick out one grain from a bushel of wheat and say that that belongs to some particular handful of wheat that was thrown into that bin; is that 1008 correct?

A. Correct.

Q. And you—and yet, you still insist that this invoice, Commission's Exhibit No. 450-B, represents a sale—

A. (Interposing) Yes, sir.

Q. —to Crystal Pure Candy Company, of this car of glucose?

A. Yes, sir.

Mr. McClester: The same as grain goes through a grain elevator. Handled in the same way.

The Witness: They received that much corn syrup. I am not saying that they received that particular corn syrup.

By Mr. Hier:

Q. This car CCLX 542, is it used, customarily used for No. 42 corn syrup; 42 degrees Baume corn syrup?

A. It is used for any of our corn syrups.

Q. You cannot mix up them in your car, can you?

A. I do not understand.

Q. Can you mix up 42 degree Baume and 43 degree Crystal corn syrup within the same car?

A. No.

Q. Then let me ask you this. I call your attention to—

A. Yes.

Q. Perhaps, I had better find it for you.

A. Thank you.

Q. I call your attention to this. I am calling your 1009 attention, for the purpose of the record, to Commission's Exhibit No. 150-Z-27.

A. Yes.

Q. I will ask you if this does not show—

Mr. Hall: (Interposing) 150-Z-?

Mr. Hier: 150-Z-27.

By Mr. Hier:

Q. I call your attention to Commission's Exhibit No. 150-Z-27, and I will ask you if that does not show 43-degree

Baume coming out of tank car CCLX 542 instead of 42 degrees Baume?

A. This particular invoice would indicate that Crystal Pure Candy Company required some 43-degree syrup.

Q. Yes.

A. We delivered that from our other syrup tank that is in our warehouse and charged it up against this particular tank, and charged them five cents per hundred pounds more, five cents per hundred pounds being the difference between 42 degrees Baume and 43 degrees Baume.

Q. This exhibit, Commission's Exhibit No. 150-Z-27, tank car No. CCLX 542 indicates that it was 42 degrees Baume?

A. Yes, but I would say that it is charged up against that particular tank, the weight is.

Q. I call your attention to Commission's Exhibit No. 150-Z-30, and ask you if this exhibit does not purport 1010 to show 43 degrees sold ex-tank CCLX 542?

A. The same condition would apply to this invoice.

Q. This previous invoice, Commission's Exhibit No. 150-Z-27 indicates ex-tank CCLX 542; is that not true?

A. Yes. The same situation on both of them.

Q. And in the same respect, this invoice, Commission's Exhibit No. 150-Z-30 is incorrect?

A. The purpose of this was, however, to let the customer know that this particular corn syrup was charged up against tank car CCLX 542.

Q. As a matter of fact, Mr. Mueller, all of these invoices which have been put into the record, reflecting sales and deliveries of glucose to the Crystal Pure Candy Company during May, June, and July, 1937, do reflect on their face that they are ex-tank car this or that number, are incorrect in so far as they purportedly show that the glucose came out of the tank car numbered there, and which you say was sold to the customer; is that right?

Mr. Hall: I object to that question unless the witness is given a chance to see these exhibits which are referred to, and see what they are.

Mr. McCollister: Suppose he answers the question, and the answer to the question is "yes", I would still object to it as having nothing to do with the issues in this case.

1011 Mr. Hier: It has something to do with the issues in this case in this respect:



The respondent has claimed all along any discrimination, if any, due to competition. These exhibits show, we think, and contend, a system of phoney bookkeeping; a system of phoney invoicing that purports to show one thing that actually was something else. That is our proposition, and therefore we think we have a right to go into that.

Mr. McColleston: I think that is not within the issues; certainly, that is not within the scope of the issues in this case.

There is no allegation here in the complaint on what you see fit to characterize as "phoney bookkeeping";

The allegation is discrimination. On the face of the exhibit that you are talking about; Commission's Exhibit No. 150-Z and sub-numbers, or sub-letters, rather, it appears that the buyer paid the going price for 43 degree glucose, if that is what he got. There is no showing that he was not charged for what he got, or that he was charged less than some other buyer, buying the same thing.

I submit that it is not within the scope of the issues here, as to phoney bookkeeping, or phoney invoicing, or anything of the sort.

Trial Examiner Hornor: Read the question.

(The question referred to was read by the reporter, 1012 as follows:

"Q. As a matter of fact, Mr. Mueller, all of these invoices which have been put into the record, reflecting sales and deliveries of glucose to the Crystal Pure Candy Company during May, June, and July, 1937, do reflect on their face that they are ex-tank car this or that number, are incorrect in so far as they purportedly show that the glucose came out of the tank car numbered there, and which you say was sold to the customer; is that right?")

Mr. Hall: I object to that question unless counsel for the Commission points out the particular invoices and unless the witness has an opportunity to inspect them, and to answer as to each and every one of them.

I insist on that, I think he should have the right to see all of the invoices which have been made out when this concern was billed for the glucose on these invoices, which you have chosen to call "phoney"; I insist upon that because that is not true.

I therefore think that the witness should have an opportunity to inspect them so that the true facts may be stated on the record.

Mr. Hier: I will do that if you wish it. I will do so, if you want to take the time, I will do it.

Mr. Hall: That is all right. There is a large 1013 number of invoices for cars, earload lots; there is a large number of invoices for tank wagon deliveries for this particular customer because it so happens that the customer bought both ways.

That is all shown on Commission's Exhibits No. 126 and No. 127.

Trial Examiner Hornor: This question does not refer to sales in tank wagon lots. It refers to sales in tank car lots.

Mr. Hall: If you are confining yourself to Commission's Exhibit No. 127, a list of tank cars sold to the Crystal Pure Candy Company, that is one thing.

Trial Examiner Hornor: The question only referred to that.

Mr. Hier: Mr. Examiner, in order to save further wrangling, I will withdraw the question, bring out the discrimination, and then come to this point.

Mr. Hall: I will be glad for you to do so.

By Mr. Hier:

Q. Mr. Mueller, how many pounds of glucose c. s. u. did you sell to the Crystal Pure Candy Company on March 25, 1937?

A. I do not know.

Q. Can you find out?

A. Yes.

Q. Will you do so now?

A. I have not the record of it here.

Q. Will you do so now?

A. Our office has the record. Do you want me to go to the telephone and obtain that information?

Q. If you can obtain the information in any way, I will be glad for you to do so.

A. I will have to step into the next room and call up if you want me to do that.

Mr. Hier: Mr. Examiner, I move a recess until he can get the information that I have requested.

Trial Examiner Hornor: All right, sir. We will take a recess for five minutes in order to give the witness time to carry out your wishes if he desires to do so.

[A five-minute recess was taken.]

Trial Examiner Hornor: Gentlemen, the hearing will now be in order. You may proceed.

By Mr. Hier:

Q. Mr. Mueller, have you obtained the information that I requested?

A. I have.

Q. Will you give it to us?

A. Fifty-three tank wagons and seven tank cars.

Q. Fifty-three tank wagons?

A. Yes.

Q. Seven tank cars?

1015 A. Yes.

Mr. Mueller, a tank car holds on an average of 95,000 pounds, does it not?

✓ A. Ninety-five thousand pounds, that is right.

Q. And seven tank cars then would be 95,000 times 7 or some 665,000 pounds?

A. Yes.

Q. Your tank wagon holds about how much?

A. I should say they run about 12,000 pounds.

Q. Twelve thousand?

A. Twelve thousand pounds.

Q. That would be about 636,000 pounds for fifty-three tank wagon loads?

A. Yes, about that.

Q. So that on March 25, 1937, you say the Crystal Pure Candy Company bought from you 1,301,000 pounds of glucose?

A. One million three hundred one thousand pounds of glucose, yes, sir.

Q. At a price of \$2.99?

A. I do not remember that. I did not check that price up.

Q. Well, the record shows that the price in 19—, in Chicago, on that date, was \$3.04 for tanks for 43 degree glucose, and I believe they purchased 42—

A. Forty-two would be two ninety-nine.

Q. Two ninety-nine?

1016 A. Five cents less for the tanks.

Mr. Hall: Two ninety-nine for tank wagon, you mean? Wasn't it two ninety-nine for the tank car, and three naught nine for tank wagon?

By Mr. Hier:

Q. \$3.09 delivered in tank wagons, or a ten cent per hundredweight addition for tank wagon delivery?

A. That is right. And that would make it two ninety-nine in tank cars.

Q. Now, Mr. Mueller, have you ever, at any time, taken from Crystal Pure Candy Company, an order on one day of that size?

A. I don't know. I don't remember that.

Q. What are the Crystal Pure Candy Company's normal thirty-day requirements from you?

A. Crystal Pure will use—

Q. (Interposing) At that time of the year.

A. I do not know about that time of the year. The Crystal Pure Candy Company will or have used up to as high as nine thousand barrels per year, and that is six million three hundred thousand pounds.

Q. Six million three hundred thousand pounds?

A. Six million three hundred thousand pounds.

Q. In a year?

A. Yes, sir.

1017 Q. What are their normal monthly requirements?

A. I don't know. It varies. But they do pick up every now and then two or three tank wagons a day.

Q. A day?

A. Yes.

Q. Would you say Mr. Kahn was incorrect if his testimony was that they used on an average of two tank wagons every three days?

A. I would say he is incorrect, yes, I would. I figure—these figures give nine thousand pounds.

Q. Do you mean nine thousand pounds or nine thousand barrels?

A. Nine thousand barrels, that represented a big year. I am not sure of last year, but I would say it ran around four and a half or five million, that is what I figure it, and that is why I do say that they use about two tank wagons a day, and have gone as high as three.

Q. Can you say what their normal thirty-day requirements are of glucose?

Mr. Hall: Mr. Examiner, does it make any possible difference whether Crystal Pure has normal requirements every thirty days of one amount or another amount? I do not see the relevancy of this line of questioning to the inquiry which is being conducted here.

I do not see how it can make any possible difference. I do not see where this line of questioning on the part of

1018 Mr. Hier is going to. It seems to me that it is entirely outside of the direct testimony of this witness.

Mr. Hier: In answer to that, I think Mr. Mueller and certainly Mr. Buhner, has stated that his company has a practice to never book a customer for more than thirty days' requirements ahead, and I do not believe that they, the Corn Products Sales Company could possibly have believed that they would have required a million six hundred thousand pounds of glucose for one month.

Mr. McCollester: Mr. Examiner, may I make the further point to that just made by Mr. Hall, that this is not cross-examination of the witness' direct testimony.

We have in mind going into the matter of these alleged delayed deliveries by another witness, who is not available today, because we expect he will be the proper one to go into that matter, as it is something which he should have most of that information..

We had expected him, but he is not here because he has been ill and he is ill at the present time.

As to this witness, if you will recall, I did not ask Mr. Mueller anything about that. His direct examination was confined to the question of sales in tank cars to customers that had no siding and ordinarily took tank wagon deliveries.

Mr. Hier: That is all part of the same case.

1019 Mr. McCollester: That is true, but—

Mr. Hier: (Interposing) Since the witnesses have testified one way, I want to know whether or not he can reconcile that testimony.

Mr. McCollester: It now happens that we are putting in our case. You have closed your case. We are putting in our case. I have called Mr. Mueller as our witness, and your cross-examination is confined to the direct testimony, and not to what he may have testified as a witness while on behalf of the Commission. Otherwise, if we are simply going to have a complete relaxation of all the ordinary rules, this case will never be finished, and it will be impossible for us to tell what we are doing.

Mr. Hier: Mr. Examiner, it has been objected to, when we went into these tank car deliveries; therefore, I am asking this witness now for the whole transaction from the beginning when, how, and why it was done, with reference to this booking, and accepting these orders.

I want the whole story, the whole picture. It seems to me that I am entitled to that.



Mr. McCollester: You have had Mr. Mueller on the stand before as your witness, and you could have asked him all you wanted to, within the limits of the complaint. But now, I submit that you are limited in cross-examination to the direct testimony. On cross-examination, I do not think counsel is entitled to examine this witness upon what someone else said, upon what this witness may have said while as a witness for the Commission.

Trial Examiner Hornor: Has Mr. Mueller testified before along this line?

Mr. Hier: Mr. Mueller testified along this line, according to my recollection, and I know Mr. John Buhrer did so testify along this line.

Mr. McCollester: What Mr. John Buhrer testified would not be a proper subject of cross-examination of this witness, and what this witness may have testified on direct on the Commission's case, would not be proper cross-examination today, when this witness is called as my witness. Certainly, I am entitled to the usual rules of procedure.

Mr. Hier: Now, no. Just a moment. I want to say that these gentlemen, Mr. Fred Mueller and Mr. John Buhrer both testified as to what this company's practice was, and when we went on to Chicago, we found a situation entirely different. I was not in possession of the facts when we examined Mr. Mueller and Mr. Buhrer, in order to properly cross-examine them. I was assured as to these matters, and I took the statements at face value, and the records show what actually turned out.

Trial Examiner Hornor: Are you attacking his credibility?

1021 Mr. Hier: I am not attacking his credibility, but I am certainly checking his statement.

Mr. McCollester: You are certainly making him your own witness, which is making this testimony a part of your own alleged case. That is not proper now. You should have done that on your direct testimony. I submit, if we are going to have no orderliness and no protection of our rights, which we are entitled to, in requiring counsel to keep within the scope of the direct examination in his cross-examination of the witness, that we shall have to appeal to the Commission before proceeding further.

Mr. Hall: You are trying to attack Mr. Buhrer's testimony?

Mr. Hier: If your Honor please, if we can have a short recess, I think we can clear this up.

Mr. McCollester: No. I think we should clear it up on the record. I do not like the way this is going. You are not cross-examining this witness, Mr. Hier, when you are asking this witness about matters regarding which he was not interrogated on his direct examination.

We are here, we have presented this witness on direct, and you now have a chance to cross-examine him on our direct examination. You do not have the right to come here, as I see it, and cross-examine this witness on your direct testimony, as our witness, because you have 1022 closed your case, Mr. Hier.

I submit, your Honor, if counsel for the Federal Trade Commission is going to reopen his case, we want to go to the Federal Trade Commission and get a ruling on that, and we will not go forward with any evidence of ours until that is cleared up.

Mr. Hier: I am not reopening my case.

Mr. McCollester: Then you certainly are not cross-examining upon the direct testimony today.

Mr. Hier: It certainly gets down to this:

This witness has gotten on the stand here and testified that all of this alleged, and what we believe to be, frankly, phoney irregularities which have taken place at Chicago, were due to competitive conditions, and I cannot go into those competitive conditions until I get the underlying facts as to the way the orders were executed, when they were placed, when they were accepted, and how they were accepted; and that calls for a detailed cross-examination.

Mr. McCollester: Mr. Examiner, you will recall that the witness I questioned only as to one phase of the testimony in Chicago; that is, these tank car sales that were delivered to tank wagon customers.

We recognize that there is another point which counsel put in evidence at Chicago, and that is the delayed deliveries. We are going into it through a witness that 1023 the counsel for the Government subpoenaed, and called for examination, when he was here at New York, and then refused to examine him.

Trial Examiner Hornor: What is the question?

(The question referred to was read by the reporter, as follows:

"Q. Can you say what their normal thirty-day requirements are of glucose?"

Mr. McCollester: That all goes, does it not, Mr. Hier, to the question of alleged delayed deliveries?

Mr. Hier: No, I want to find out, among other things, why this large order was accepted just before or after the price increase, and why it was accepted partly in tank cars and partly in tank wagons, and what the reason for this, what the witness says himself is an unusual method of procedure here.

Trial Examiner Hornor: The objection is overruled. The witness may answer the question as put to him.

Mr. McCollester: Exception.

Trial Examiner Hornor: Noted.

By Mr. Hier:

Q. Will you answer the question, please?

A. I frankly do not recall just what the question is now, Mr. Hier.

1024 Q. Well, I asked you if you could say what their normal thirty-day requirements are, of glucose?

A. It varies. At Eastertime, they do a big business, larger than usual. And at Christmas time, they do a large business. As I mentioned before, this buyer has taken as many as five tank cars in two days.

Mr. Hall: You mean tank wagons?

Mr. McCollester: You mean tank wagons, don't you?

The Witness: I beg your pardon. Tank wagons, in two days, two on one day and three on the next day.

By Mr. Hier:

Q. That still does not answer the question, Mr. Mueller. What do you estimate the normal thirty-day requirements of glucose of this customer?

Mr. McCollester: What do you mean by the word "normal" in that connection?

Mr. Hier: The word "normal" was used by this witness and by Mr. Buhrer. I do not know what it means, and I will call upon the witness to tell us what it means. That is what we are trying so hard to get at.

The Witness: Normally, that would apply on a period of a year.

As I just mentioned, around Christmas holidays, their normal requirements will run five tank cars—

1025 Mr. McCollester: Tank wagons.

The Witness: Tank wagons, in two days. That also applies around Eastertime.

By Mr. Hier:

Q. What would you say that would be in March?

A. That is around Eastertime.

Q. What would you say that would be in March, I repeat.

A. Two wagons one day and three the next; that is, five tank cars in two days.

Q. You mean five tank wagons?

A. Five tank wagons.

Q. Five tank wagons?

A. Yes.

Mr. Hall: You are saying "tank cars", I think, when you mean tank wagons. He is putting down what you say, and of course, he can't change it.

The Witness: I mean tank wagons.

Mr. Hall: Then say it.

By Mr. Hier:

Q. Are you referring by "five tank wagons" to your regular five tank wagons of glucose?

A. Yes, sir.

Q. And how much does that amount to, I mean, in pounds?

A. Well, a wagon is twelve thousand pounds.

Q. A tank wagon is twelve thousand pounds?

1026 Twelve thousand. That would be thirty weeks, a week, I mean, fifteen a week, which times twelve that would run about one million eight.

Q. One million eight hundred thousand pounds in March?

A. No, the March figure, might figure more than that. In March, my figure would be up, there.

Q. You would estimate the Crystal Pure Candy Company's consumption in March to be about how much?

A. Fifteen times twelve, that is during their busy season.

Q. During March?

A. I talked about Eastertime and the Christmas holidays.

Q. Yes.

A. That is, well, let me see, two, three, five, I will say a million and a half.

Q. A million and a half pounds?

A. At those periods.

By Mr. McCollester:

Q. Excuse me for interrupting there, but is there not a mistake in your calculation, there? I think it would be well for you to calculate that over again.

A. Well, there might be.

Q. I am referring now to your purely mathematical calculations.

A. I see.

Q. Suppose you multiply those again. I think you have got about twice as much.

1027 A. All right. I will do that. Now, let me see, two times—well, twelve times—oh, yes, I see it, I think I see it. Oh, here it is. There is a mistake in the calculation.

Q. Suppose you calculate it over again.

A. O. K. All right. There is a mistake in the calculation. The figure I gave was not right. It would amount to around, in those months, 750,000.

By Mr. Hier:

Q. Seven hundred and fifty thousand pounds?

A. Seven hundred and fifty thousand pounds.

Q. Well, now, Mr. Miller, when you accepted an order for seven tank cars, or the contents thereof, on March 25, 1937, which would run about 665,000 pounds, you knew, did you not, that you could not possibly deliver that glucose in tank cars to begin with?

A. We delivered it through the filling station.

Q. You knew you could not deliver it in tank cars?

A. At their plant?

Q. Yes.

A. Correct.

Q. You knew also that that was more than their thirty-day requirements, did you not?

A. I did not know that. I did not know that.

1028 Q. What?

A. That I did not know.

Q. You did not know?

A. I did not know.

Q. Now, then, when you accepted this order for 1,200,000 pounds, you say you were doing that to meet competition?

A. Correct.

Q. Whose competition at that time?

A. I believe it was Hubinger.

Q. H-u-b-i-n-g-e-r?



A. H-u-b-i-n-g-e-r. I think this memorandum shows that. (Witness examines memorandum.) Hubinger.

Q. Hubinger?

A. Hubinger.

Q. Did you say that Hubinger offered the Crystal Pure Candy Company one million two hundred thousand pounds of glucose at \$3.04 base Chicago price 43-degrees Baume?

A. No. I did not say that. I did not say what amount Hubinger offered to the Crystal Pure Candy Company.

Q. What amount did they offer?

A. They did offer tanks at that figure, but I do not know how many.

Q. From whom did you get that information?

A. It came from our Chicago office, or through our Chicago office.

1029 Q. It came through your Chicago office?

A. It came through our Chicago office.

Q. Do you mean some salesman wrote you or told you about it?

A. That it came from that office, one way or the other, yes, sir.

Q. You do not know whether any of the Crystal Pure Candy Company officials said that or not?

A. That I do not know.

Q. Did you make any effort to find out whether Hubinger did make any such offer, as a matter of fact?

A. There is no way I can find it out.

Q. There is no way you could find it out?

A. There is no way I could find it out.

Q. Not even through your Chicago office?

A. No. They would not know.

Q. Did your information include any statement as to what amount Hubinger had offered them in this unusual method of tank cars?

A. You are going back pretty far, Mr. Hier. I do not know the details of the transaction. This was something the details of which they would handle out there. I only knew the main part of the transaction, that part which would come to me for my attention.

Q. You have nothing then, to base your sales 1030 or alleged sales of seven tank cars of glucose on March 25, 1937, to the Crystal Pure Candy Company because of competitive conditions, except what one of your salesmen either told you or wrote you from Chicago as to what

Hubinger—as to the statement that Hubinger, or the Hubinger Company had made an offer to sell glucose in tank car lots and deliver in tank wagons; is that right?

A. That is right.

Q. Now, then, do you have the order for these seven tank cars?

A. No.

Q. You do not?

A. No.

Q. Do you have an order for the whole million two hundred thousand pounds?

A. What kind of an order do you mean?

Q. Do you have an order, purchase order, or invoice, or memorandum—

A. No.

Q. —or confirmation, or anything of that sort?

A. No. That business is done principally over the telephone.

Q. I call your attention to Commission's Exhibit No. 148-B, up in the right-hand side, right-hand top, on that photostat, you also will see the number 4933-3-26, and that is under the printed word "Contract"; does that represent the number of your contract with the Crystal Pure Candy Company?

A. I would say so.

Q. Then you did have a contract?

A. Confirmation.

Q. Confirmation?

A. Yes, sir.

Q. Do you have a copy of it here in New York?

A. No.

Q. Where is it?

A. We do not keep documents of that kind over two years.

Q. These have been destroyed, then?

A. Yes, sir.

Q. What have you to show—

A. Sales record.

Q. —sales record?

A. Sales card.

Q. Sales card?

A. Yes, sir.

By Mr. Layton:

Q. Are all of the sales, or should all of the syrup sold at that time, bear some contract date and number?

A. To this same buyer?

Q. Yes.

A. Not necessarily.

1032 Q. How many numbers would that ordinarily be?

A. I do not know. I would have to check the record.

Q. Did you make this contract yourself?

A. No, sir.

Q. Who did make it?

A. The Chicago office.

Q. Who in Chicago?

A. I do not know which individual handled it.

Q. These books, or bookings, are bookings of this kind, you do not have anything to do with these?

A. I pass on these.

Q. Do you pass on—do you pass on this particular one?

A. I do not know.

Q. You would not remember a customer who had been previously buying solely one and two tank cars of a—tank wagon deliveries, and suddenly he gave you an order for one million two hundred thousand pounds, and you cannot recall it?

A. No.

Q. How can you recall so distinctly that it was due to an unusual competitive situation, you do recall that?

A. That is right. I have the record here. (The witness indicates a document marked Respondents' Exhibit No. 1 for identification.)

Q. Would it not be odd if, referring to Commission's Exhibit No. 128-B, which, on that contract shows—  
1033 which on that invoice shows Contract 4340, dated, apparently, 2/23, showing delivery in tank wagon, and 3-25-37, and those following it apparently which you say is the same order, there appears Contract 4983; how would that be?

Mr. McCollister: Did he say it was the same order?

The Witness: I did not say it was the same order.

Mr. Hall: I do not recall him saying that.

By Mr. Layton:

Q. But all of those orders were entered on the twenty-fifth of March, were they?

A. There may have been one or two days in between.

Q. Then, Commission's Exhibit No. 129-B, which was the one having the notation, Contract 4983, which is dated 3/26, would that be the order that you were referring to, that was secured on 3/25?

A. I do not know. I would have to check that.

Mr. Hall: What was the date of the order, the first order, 3-26?

Mr. Layton: The contract, the contract number that is referred to.

By Mr. Layton:

Q. Referring to Commission's Exhibit No. 142-H, which was dated 4/28/37, it shows a contract number 2503-NB, how does that occur when all of the rest of the ship-1034 ments were made under contract 4983, or most of them?

A. I would not know the detail.

Q. Is there any possibility that you could tell us? Is there any possible way that you could explain it?

A. No. That is a detail that I would not know.

Q. What does the "NB" after the contract number mean?

A. I do not know.

Q. Do you see here what I am referring to?

A. I think I have heard of "NB" standing for "new business." I do not know whether it means that or not.

Q. No, no. This is not new business. This is business you got, this one million two hundred thousand pounds, that is referred to during the period of Contract No. 4983.

Mr. McCollester: Now, that is what you are saying and that is not the testimony.

Mr. Layton: I am referring to the exhibit.

The Witness: I would have to check it.

By Trial Examiner Hornor:

Q. You would have to check it?

A. Yes.

Trial Examiner Hornor: Show the witness the exhibits.

The Witness: I do not know. I would have to check up our records as to what these different numbers that he speaks of refer to.

1035 Mr. Hier: What exhibit is that?

Mr. Layton: The first one I mentioned was Exhibit No. 128-B, which shows contract No. 4340-2/23, which is the first delivery of the tank wagon made on three diagonal two five after you secured the order, apparently.

Mr. McCollester: That is not what it means. I object to any cross-examination of this witness upon the whole range of exhibits, this whole bunch, in fact, of exhibits which were put in by the Federal Trade Commission, which this witness has not seen heretofore.

Mr. Layton: I believe it is Corn Products Refining Company's exhibit.

Mr. McCollester: These went in through and were taken from the files of the Crystal Pure Candy Company, I believe.

Mr. Layton: Do you deny that they are valid copies of invoices of the Corn Products Refining Company?

Mr. McCollester: I do not deny that they are valid copies of the invoices. I do not know what they are. But I do deny that the witness has ever seen them, for the purpose of this cross-examination, or of identifying them to explain them in any way, but this is part of the testimony that was taken in Chicago, apparently, and I do not think this witness has heretofore been called upon to explain the price basis or contract, or anything of that kind; that 1036 was taken in connection with the business, which the company received on 3/25, which is the alleged price referred to here, I do not know whether that was the matter of a single contract or more than one contract, or what it was, and I do not think that it is proper cross-examination of this witness.

The Witness: This would appear as if it were February 23.

Mr. McCollester: My point is simply this, that this witness has not seen these exhibits before, and without going into the question of their authenticity whatsoever one way or the other, I say that this witness did not put these exhibits in, and I do not think this is proper examination of this witness upon them.

Mr. Hall: There is no evidence at all that it is a single contract. That is merely the statement of counsel.

Mr. Hier: Well, forty contracts, then. He says he is the one who had to approve them, we want to find out what the situation was. He said he was meeting competition



when these contracts were entered into. We want to find out whose competition, when, and where, and how.

Mr. McCollester: If that is what you want to find out, why not ask that? These questions certainly do not lead in that direction.

Mr. Hier: First, we have to know what the things on them mean. We do not know what these things mean.  
1037 We cannot intelligently cross-examine the witness until we know that.

You have to lay a foundation, you know.

By Mr. Layton:

Q. What is that?

A. I would say that is the date of the contract and the contract number.

Q. Then, this is the contract for that particular shipment that was not secured on 3/25, it was secured on 2/23; is that correct?

A. I don't know.

Q. How would you interpret that?

Mr. McCollester: I object to any interpretation. He said he does not know.

Trial Examiner Hornor: The witness says he does not know. The objection is sustained.

By Mr. Layton:

Q. Are you familiar with the method in which your products are invoiced?

A. No. I do not bother with that.

Q. What is your position with the company?

A. Sales manager.

Q. You are the person who secures the contract?

Mr. Hall: Confirms them. He is not the sales man.

Mr. Layton: Just a minute.

1038 By Mr. Layton:

Q. They finally come to you after being secured, and yet you do not know how they are designated?

A. I know the confirmation price, and I know the dates of them.

Q. What is that number up there; is that the confirmation number?

A. I mentioned that that would indicate the confirmation number and date. I mentioned that.

Mr. McCollester: Confirmation number?

The Witness: This number here.

By Mr. Layton:

Q. Does it not necessarily mean that it does indicate the contract number and the date?

A. Correct, I would say.

Q. That is, your contract No. 4340 dated 2/23; is that correct?

A. I mentioned that this number and date indicates that it was a confirmation number, but I cannot answer positively.

Q. That is your best impression?

A. That is right.

Trial Examiner Hornor: You are speaking of confirmation numbers and of contract numbers, now. I think we should be careful to keep them straight.

1039 By Mr. Layton:

Q. You have indicated that that is the date of the confirmation, I think.

A. Presumably.

Q. Would it be possible that the contract number 4983 would have two confirmation dates; the confirmation No. 4983; namely, 3/25 and—I beg your pardon—2/25 and 3/26?

Mr. McCollester: I thought the confirmation date was two diagonal two three.

By Mr. Layton:

Q. I am talking about Contract No. 4983.

A. Will you repeat your question, then?

Q. Exhibit No. 138-B on your invoice No. A-942.

Mr. McCollester: Show the exhibit to the witness so that he may see.

By Mr. Layton:

Q. I should have said 139-B.

A. Uh-huh.

Q. I mean Commission's Exhibit 139-B.

A. Yes?

Q. Here you are.

A. Yes. (The witness examines document.)

Q. What does that indicate there? Will you explain that, please, that little sequence there?

A. Contract number?

1040 Q. Contract No. 4983, diagonal three, diagonal two five. What does that mean?

A. I mentioned before, that would indicate the date of the confirmation, and the number of the confirmation.

Q. Confirmation of what?

A. Of sale.

Q. Of the sale?

A. Yes.

Q. Now, referring to Commission's Exhibit No. 132-B.

A. Yes.

Q. Again, Confirmation No. or Contract 4983 bears the date three hyphen two six.

Mr. Hier: In this one?

Mr. Layton: 132-B.

Mr. Hier: No. That is not the one.

Mr. Layton: 130-B? I have the wrong number, apparently.

Mr. Hier: No. There are two exhibits in this record, both of them being numbered 132-B. Here is one bearing that number, and here is another bearing that number. They are two entirely different exhibits. These exhibits were put in at Chicago.

The Witness: What is the question?

By Mr. Layton:

Q. What does the 3/26 under the word "Contract" indicate?

1041 A. That indicates that the sale was made on March 26, Confirmation 4983.

Trial Examiner Hornor: That is on invoice No. A-291.

There seems to be some mix-up here, two exhibits bearing that same number.

Mr. Layton: What I am trying to find out is when this order was entered.

Mr. McCollester: What you are drawing attention to is the fact that one of the exhibits bears the No. 4983, followed by the figures 3/26, and the other refers to the same contract number followed by the figures 3/26?

Mr. Layton: No. The first one bears the figures 2/25, and the second one bears the figures 3/26.

Trial Examiner Hornor: Which one is that, what contract is that?

Mr. Layton: That is what I am trying to find out.

The Witness: This looks like a typographical error.

By Mr. Layton:

Q. Then if it appears more than once, it would still be a typographical error?

A. I do not know.

Q. Now, I would like to call your attention to further exhibits.

A. Yes.

1042 Q. Commission's Exhibit No. 142-H.

A. Yes.

Q. Commission's Exhibit No. 142-K.

A. Yes.

Q. Your invoice Nos. 1-A—

A. This one?

Q. I beg your pardon. A-1445 and A-1446.

A. Yes.

Q. Both of them showing a shipment and delivery in tank wagon to the Crystal Pure Candy Company on 4-28-37.

Mr. Hall: That is dated 4-28-37?

Mr. Layton: Yes.

By Mr. Layton:

Q. What is the contract confirmation number on Commission's Exhibit 142-H?

Mr. Hall: Well, you have it in the exhibit. Why ask him about it?

Mr. McCollester: The exhibit will certainly speak for itself on that.

By Mr. Layton:

Q. Is that 2503-NB; is that correct? 2503-NB?

Mr. McCollester: That appears on the exhibit, I will stipulate that.

The Witness: Yes.

By Mr. Layton:

1043 Q. Now, on Commission's Exhibit No. 142-K, you will note that the lettering on the same day, this one, 4983, is the contract number, all of which you say was made under the contract dated 3/25, how many contract numbers did that contract have?

A. I did not say that at all. I do not see that date here, sir.

Mr. McCollester: He said what? Did he say that these were all made out of one contract No. 4983?

Mr. Layton: That was the information furnished to us, appearing in Commission's Exhibits Nos. 138-A to Z, and so forth.

Mr. Hall: No, we said that we had an order that date.

Mr. McCollester: This certainly is not cross-examination of this witness on the direct testimony.

Mr. Layton: Just a minute, I suggest that we read the question.

Mr. McCollester: May I make this further point, and by way of objection, as I understand all these documents which are being referred to, represent invoices which presumably were furnished to the Commission by the Crystal Pure Candy Company, and I assume that they are documents which may have been originally prepared by the respondents, as they were furnished to counsel for the 1044 Federal Trade Commission by the Crystal Pure Candy Company, but there are certain things here which it would appear are very confusing by the way these exhibits are put together. There are various things here which indicate to me that these exhibits were cluttered up when they were marked out in Chicago, and it seems to me that these documents are all mixed up, and not properly hitched together. They do not seem to make sense the way they are put together here, as far as I can see. I have just been examining them.

Mr. Layton: You do not deny the authenticity of the documents, do you?

Mr. McCollester: No, I do not deny the authenticity of the documents, but I question, without admitting or denying, whether the documents, themselves, have been properly hitched together by the Crystal Pure Candy Company, or by the reporter in marking them, I do not know about that. They certainly seem to be very peculiar to me. I think that they should be checked against the original documents and gotten into proper order before we go any further with this.

Mr. Layton: I am not talking about the mechanics of hitching these together mechanically. The fact remains that these two invoices dated the same day, showing tank wagon shipments which, as the witness testified to, all were secured under the order for one million two hundred 1045 thousand pounds on 3/25/37, both of which reveal that they apparently bear a different contract number, and I want to find out whether or not it is true, and what the explanation is for it.

The Witness: I am not in a position to explain that. I would have to check back on that. That is a detail I do not handle.

Mr. Hier: Mr. Examiner, right at this point, I think Mr. Cull positively testified in Chicago that he did not know



anything about these various numbers that were shown on these invoices, when it was all done, in New York under this witness' supervision and instruction, I mean the witness that is testifying on the stand now, and now we come to this witness, and he says that he does not know anything about it.

Mr. McCollester: Now, wait just a minute, Mr. Examiner. I believe that Mr. Cull testified that the man in New York who would give the details about this was Mr. Schmidt. I think your Honor will recall that.

Trial Examiner Hornor: No. I do not recall, frankly, just what was said in that regard.

Mr. McCollester: Well, he did, anyway.

Trial Examiner Hornor: I am frank to say, I do not recall one way or the other. I should be glad to refer to the record, if you wish.

Mr. McCollester: Mr. Schmidt was subpoenaed by 1046 counsel for the Federal Trade Commission at the last hearing in New York City, and when we brought him here and presented him for examination, they would not examine him. And we said, "Here is your man. We have brought him here for any examination you wish." They, however, refused to examine him, and went out to Chicago and Mr. Cull in Chicago, pointed out that Mr. Schmidt was the man to answer these questions.

We intend to call Mr. Schmidt as our own witness on the question of delayed deliveries.

Trial Examiner Hornor: Proceed.

By Mr. Layton:

Q. As a matter of fact, you do not know anything about this order at all, do you?

A. I do not remember the dates of it.

Q. What details do you remember about it?

A. I do not remember any part of it. This was back in 1937, you see.

Q. Let me ask you another question, please.

A. Yes.

Q. Will you determine whether or not you shipped car CCLX 526 and car CCLX 524 to the Crystal Pure Candy Company at the time we are speaking of, I mean, shipped to them; that is, I mean, shipped to them in the method you have testified they were shipped?

Mr. Hall: Do you mean 524? I do not seem to 1047 have any recollection of this shipment. Does he have any recollection of this shipment?

Where do you find that on your list? I do not find it on this list.

Mr. Layton: No, I could not find it on that one. However, I think you can find it here. If you want to, you perhaps will locate it here. That is just what I want to find out. I wonder if the witness can find out if and when those two cars were shipped to the Crystal Pure Candy Company. That is exactly what I want to clear up.

Mr. Hall: These exhibits, does it appear upon them?

Mr. Layton: Perhaps if I explain this whole thing to you, it will be a little clearer.

I should like to be off the record.

Trial Examiner Hornor: We will take a five-minute recess.

(A five-minute recess was taken.)

Trial Examiner Hornor: The hearing will come to order. Proceed.

Mr. McCollester: Will you read the question which has been put to the witness, please?

Trial Examiner Hornor: Read the question.

(The question referred to was read by the reporter.)

Mr. McCollester: There is no 524, is there?

1048 Mr. Layton: Yes. It is on Commission's Exhibit No. 150-C.

Mr. McCollester: That just indicates the strength of my previous point, Mr. Examiner; that is, that this examination of the witness is on the testimony of Mr. Cull, and I submit that is entirely improper. It has nothing to do with the direct examination of this witness.

Mr. Layton: He has testified that he knows about this shipment, that he knew about this shipment, with reference to what tank cars were shipped, these tank cars here that went to these customers, and I would like to find out how much he does know about it, and if he does not know the answer to this question, he can so state and that will end the matter.

The Witness: I do not remember, and I would not want to say that I know anything definitely about this particular shipment. I do not know whether the transportation records on this particular car are available or not, but I would like to check it up and find out.

I do not know what records are available, but I will check up and get the information.

Mr. Hall: What do you want beyond that?

Mr. Layton: Just what my question calls for.

By Mr. Hall:

Q. Mr. Mueller, what you mean to say is that you 1049 know that he took the order from the Crystal Pure Candy Company and shipped it to them?

A. That is right.

Mr. Layton: I would like to suggest that if I ask one or two questions here, I think we can go on to something else.

Mr. Hall: That is all right.

Mr. Layton: I would like to suggest the question just asked by Mr. Hall be stricken. I do not believe that is proper.

Mr. Hall: That is all right. I do not care whether it goes in the record or not. All right. It does not make any difference to me whether it goes on the record or off.

Trial Examiner Hornor: It may stand. Proceed.

By Mr. Layton:

Q. Do you know whether or not any of your competitors have sold any corn syrup to the Crystal Pure Candy Company since June 19, 1936?

A. Well—

Q. Well, I will put it this way: isn't it true that you have sold to them exclusively? Isn't it true that you have been their sole source of supply since June 19, 1936?

A. To the present date?

Q. Yes.

1050 A. No. It is incorrect.

Q. When was the last time that your competitors sold them?

A. They are selling them now.

Q. When did they start to sell them?

A. I do not know exactly when, I would say it was around the beginning of last year.

Q. Had they sold them anything since June 19, 1936 and—March 3, 1937, or, March 25, 1937?

A. I do not know.

Mr. McCollister: Just when do you mean to begin? You have named two dates there and you did not name any ending.

By Mr. Hier:

Q. As a matter of fact, your company—

Mr. Hall (Interposing): How would we possibly know that? How could we possibly know who had been selling to the Crystal Pure Candy Company?

Mr. McCollester: Obviously, the witness could not possibly know that.

The Witness: I could not tell you when our competitors have sold to them. I could not tell you that. I would not know.

By Mr. Hier:

Q. Mr. Mueller, you say that this selling of tank cars and delivering in tank wagons was available to all tank wagon users?

1051 A. It was at that time.

Q. At what time?

A. When we made these sales.

Q. In 1936 and 1937? Right?

A. I will say, 1937.

Q. It was not available in 1936, then?

A. I am not sure of that.

Q. Well, if that is true, the Peanut Specialties Company was the only one you sold to by that method in 1936?

A. You are going back quite a while. I would not want to say yes or no. To the best of my recollection, I will say it was not made available to everybody in 1936.

Q. It was not?

A. Yes, on that particular time when we made it to meet the competition of our competitors. At the particular time we made it, it was made definitely to meet the competition that we met there.

Q. In 1930, is it your statement that it was made available to everyone?

A. Yes, that is right. Those of our tank wagon buyers who wanted to take advantage of it.

Q. That was done to meet a competitive situation?

A. That is right.

Q. All right. Now, then, pardon me a moment while I go through these lists and get them.

1052 A. Yes.

Q. Let's take them up one by one.

A. Yes.

Q. The sales which were made to the Crystal Pure Candy Company billed as tank cars and delivered in tank wagons, you say were made because one of your Chicago salesmen reported that Hubinger, a competitor of yours, offered them glucose in the same manner; is that correct?

A. Yes.

Q. Who is that salesman?

A. I believe it was Art Anderson.

Q. Art Anderson?

Q. Yes.

Q. Did he report that to you in writing?

A. No, it came through our Chicago manager.

Q. Mr. Cull reported it to you?

A. Yes. He reported it to us, but I do not say he did it in writing.

Q. Do you know how he reported it, whether it was in writing or over the telephone?

A. Well, it may have been over the telephone or in writing, I do not know.

Q. You also made sales in tank cars and delivered in tank wagons to Walter H. Johnson Candy Company, did you not?

A. Yes, sir.

1053 Q. Whose competition was that meeting?

A. I do not know whether it was mentioned here. (Indicating Respondents' Exhibit No. 1 for identification.) But when we offered those tank cars to tank wagon buyers, we did it in general, after we were compelled to meet competition.

Q. Now, what do you mean by you "did it in general"; did you send out a notice?

A. No.

Q. How did you do it?

A. Not to my knowledge we did not send any notice, it was passed along by word of mouth.

Q. It was passed along by word of mouth?

A. We passed it along to our branch managers, and just how he handled it, I do not know.

Q. In other words, you told Mr. Cull that you would sell glucose in tank car lots and deliver in tank wagon lots, and by tank wagon delivery to tank wagon users; at that time; to all tank wagon users; is that correct?

A. Yes.

Q. In March, 1937?

A. Yes.

Q. You told Mr. Cull that?

A. Yes.

Q. You did not write it to him?

A. Not to my knowledge.

1054 Q. You told him that?

A. Correct.



Q. Now, then, what did Mr. Cull do to notify the trade?

A. I do not know how he handled it.

Q. You do not know how he handled it?

A. I do not know how he handled it.

Q. Well, now, whose competition were you meeting in your sales in this category to the Walter H. Johnson Candy Company?

A. Well, as I just mentioned, I do not know whose competition it was, but when we offered it to some of these buyers of ours who were offered it by our competition, we made it in general.

Q. Well, "by our competition," the only competition you met was from the Hubinger Company?

A. And Union.

Q. You did not mention them until a year later?

A. Yes, it was from both of them, I know that.

Q. To whom?

A. Peanut Specialties Company.

Q. They offered it again to the Peanut Specialties Company in March, 1937?

A. Yes.

Q. Where did you get that information?

A. That came from our Chicago office.

Q. Who, in your Chicago office, gave you that information?

1055 A. It may have been Cull, but I do not know definitely when, because it is back quite a ways.

Q. The Union Starch and Refining Company, and Hubinger?

A. Yes.

Q. Any one else?

A. Let me see.

Q. Yes.

A. (Referring to Respondents' Exhibit No. 1 for identification.) This memorandum indicates that they were the only two concerns in Chicago.

Q. You have no independent recollection outside of this memorandum, do you?

A. No.

Q. About this whole situation?

A. Well, I have a fair recollection of it.

Q. Now, then, according to your recollection, and according to the memorandum which is identified as Respondents' Exhibit No. 1, your statement is that the only two com-

petitors whom you heard were offering to sell glucose in tank car lots deliverable in tank wagon lots, was the Union Starch and Refining Company?

A. Yes.

Q. And Hubinger?

A. In Chicago?

Q. Yes.

1056 A. Yes.

Q. Now, then, you also sold glucose in this manner to Walter H. Burke Candy Company; did you not?

A. Yes.

Q. And it was the same information which you received from your Chicago salesman, or at least, from your Chicago branch office, with respect to these two particular refiners which led you to sell Walter Burke in this manner?

A. Yes, sir. It was the general condition at that time that made it available to every tank wagon buyer.

Q. Well, now, you do not know whether it was made available to every tank wagon buyer or not?

A. To the best of my knowledge and belief, it was. We issued instructions to Mr. Cull to do so.

Q. You issued instructions to Mr. Cull to do so?

A. I issued instructions to Mr. Cull to do so.

Q. Were they oral instructions?

A. I tell you I do not know now.

Q. Can you find out and ascertain for us whether they were oral or written?

A. No, I cannot, because I would have handled that myself, and I would not know whether I telephoned him or wired him, or how it would be done.

Q. You do not have, then, any files which contain—or, let me put it this way, and we will get at it more directly,  
1057 you do not have that in the file which contains the memorandum heretofore marked for identification, "Respondents' Exhibit No. 1," any other memoranda which would indicate whether you issued instructions, or to whom, or what the instructions were, or anything of that sort?

A. I do not know.

Q. This memorandum does not mention anything about it?

A. About what?

Q. About issuing instructions to make available—

A. (Interposing) No.

Q. —these tank car lot prices to all users of tank wagon deliveries?

A. No.

Q. You do not have that?

A. No.

Q. F. H. Holloway, do you know whether they were made available to them?

A. They were made available to them.

Q. They were made available to M. J. Holloway?

A. Yes, and they bought, too.

Q. When did they first buy under that system?

A. I cannot give you the exact date. It is a matter of record.

Q. Let's see if we can refresh your recollection.

A. It is a matter of record.

1058 Mr. McCollister: May we have a two or three minute recess?

Trial Examiner Hornor: Take a three-minute recess.

(A three-minute recess was taken.)

Trial Examiner Hornor: Proceed.

By Mr. Hier:

Q. Is it a fact, Mr. Mueller, that it was only after Holloway asked Art Anderson about this privilege, that it was made available to him?

A. I would say no to that, to the best of my recollection, because we offered it in general, and Holloway, naturally, would have come in.

Q. You do not know whether Holloway knew it—

A. Well—

Q. You do not know whether Holloway knew about it from knowing Art Anderson, and from anything Art Anderson said before he asked for it, do you?

A. No.

Q. Now, then, who else buys in a tank wagon lot in Chicago?

A. Paul Beicht.

Q. How do you spell it?

A. B-e-i-c-h-t.

Q. Paul Beicht?

A. Yes.

1059 Q. Did you sell him any glucose in this manner?

A. I believe we did.

Q. You did?

A. I am quite sure we did.

The Witness: Have you got the list there, Mr. Hall?

Mr. Hall: Did you bring it with you?

The Witness: I thought I did. Oh, here it is.

By Mr. Hier:

Q. Whom else in this manner?

A. Ambrosia Candy Company.

Q. And you spell that?

A. A-m-b-r-o-s-i-a Candy Company.

Trial Examiner Hornor: Are you talking about that particular time?

By Mr. Hier:

Q. That is March, April, and May of 1937?

A. March, April, May, 1937.

Q. Did you sell them in that manner?

A. Yes.

Q. Who else? Commercial? Do you know The Commercial people?

A. No, I do not know The Commercial people.

Q. Did they use tank car—did they use tank wagon lots, I mean?

1060 A. What is that?

Q. Did they use tank wagon lots?

A. I do not know that. I do not know.

Q. Do you know whether or not you made it available to them, or told them anything about it?

A. We did not make any sale, but I believe that is somebody's else customer. I do not think it is our customer, that one. I do recall the Fascination Candy Company.

Q. They bought in this manner, also?

A. They bought in this manner, also, the Fascination Candy Company.

Q. All of these sales were made, Mr. Mueller, to meet the reported offer of the Hubinger and Union Starch and Refining Company made to the Peanut Specialties Company and the Crystal Pure Candy Company, respectively, to sell in a like manner; is that correct?

A. Correct.

Q. You personally know that?

A. Yes.

Q. You do not know whether Union Starch and Refining Company, or the Hubinger Company offered to sell Walter Johnson in that manner, do you?

A. I do not know.

Q. You do not know whether Fascination — whether the Union Starch and Refining Company, or the  
1061 Hubinger Company offered to sell the Fascination Candy Company in that manner?

A. I do not know.

Q. You do not know whether Union or the Hubinger Company offered to sell Walter Burke in that manner, do you?

A. I do not know.

Q. Nor do you know whether or not the Union Starch and Refining Company or the Hubinger people offered to sell Holloway in that manner; do you, Mr. Mueller?

A. No.

Q. There is nothing either in your recollection or your files to indicate whether they did or not?

A. No.

Q. Mr. Mueller, at the time these sales were made in this manner—as you said, in this irregular manner, you were also selling to all of these accounts in tank wagon lots, were you not, and billing them in tank wagon lots?

A. Yes, I should say so.

Q. If it were necessary to meet the testified to and outlined alleged competition of Hubinger and Union Starch and Refining Company, why was it necessary to sell and invoice them in tank cars and then deliver in tank wagons?

A. To be on a competitive basis.

Q. I know. But what I mean is: if Hubinger was offering to sell the Crystal Pure Candy Company glucose deliverable in tank wagons at Crystal Candy Company's plant, at a price of \$2.99 plus ten cents for delivery, why could you not likewise sell and deliver them tank wagons of glucose at your price; that is, at that price, at their plant without billing them for tank cars and setting the matter up on your books as sales of tank cars?

A. Well, I think I mentioned before, it was a competitive condition. We knew it existed in several places, and when we met that condition in these places, we offered it to meet the competition. It was either meet the competition or get out of the business.

Q. Mr. Mueller, the competitive condition to which you refer, was the offer to sell by Hubinger to the Crystal Pure Candy Company of forty-two-degree Baume glu-



case at \$3.09 delivered at the Crystal Pure Candy Company's plant on and after 3/25/37; was it not?

A. I do not know. I do not know what they offered.

Q. What do you mean by that?

A. We knew it existed with the Peanut Specialties Company. We knew that it existed there.

By Mr. McCollister:

Q. You said you knew that existed. What existed?

A. What is that?

Q. Just state for the record what it was that existed.

A. Well, they had received shipments of tank cars and the goods were acquired through the Union  
1063 Starch and Refining Company filling station.

By Mr. Hier:

Q. All right. Let's get back now to the Peanut Specialties Company, for a moment.

A. Yes.

Q. Your information was that in March of 1936, and the early part of August, 1936, the Union Starch and Refining Company had not only offered, according to your testimony, but had actually sold tank cars of glucose to Peanut Specialties Company, and had delivered such glucose in tank wagon lots, charging therefor some sort of price.

Now, then, from a competitive angle, the customer is interested primarily in price, is he not?

A. Yes, sir.

Q. Now, then, why was it that in 1936, you could not have sold and delivered an invoice, as such, tank wagons of glucose to Peanut Specialties Company in May of 1936 and in August of 1936, without this bookkeeping arrangement and setting it upon your books as tank cars sold and showing it as tank cars sold to that company?

A. I do not follow your question.

Mr. Hier: I will withdraw it, and cut it to pieces. I will take it up piece by piece.

By Mr. Hier:

Q. You said your customers were particularly and  
1064 primarily interested in price that they paid for the glucose?

A. Yes.

Q. Does it make any difference to him how it is delivered?

A. No.

Q. Or how you set it up on your books?

A. No.

Q. From a competitive angle, then, therefore, why in 1936 when you heard that the Union Starch and Refining Company was selling glucose to the Peanut Specialties Company, why didn't you likewise sell glucose in tank wagon lots at that price?

Q. Yes, we did.

Q. You also sold them in tank wagon lots?

A. Yes.

Q. Why did you sell them in tank cars?

A. Well, we sold them in tank cars to meet competition.

Q. But you were meeting a price competition, as far as you were concerned, in meeting their price, and I want to know why you sold it as a tank car price when you were actually delivering it as a physical tank wagon delivery.

A. Well, that was the only way that we could meet that price, was to give them the tank car price.

Q. Will you kindly explain that, please? That is what I am trying to get at here.

A. We have tank car prices and we have tank wagon prices, and if we were meeting the competition by 1936 giving them, on tank wagon deliveries, by giving them tank car prices, it would be inconsistent.

Q. In other words, tank car sales you made in 1936 were ten cents per hundredweight under the tank wagon price; is that correct?

A. On this business, he got regular tank car prices, but he delivered the goods with his own tank wagons. He picked them up with his own tank wagons. He got the regular tank car prices.

Q. Just a moment. The Crystal Pure Candy Company did not pick up any deliveries in their own tank wagons, did they?

A. No. Not to my knowledge.

Q. You stated a moment ago, that although you were delivering the glucose in tank wagons, that if you cut the price to the tank car price, but billed it as a tank wagon price, that you would be inconsistent; yet, you also said that the delivery was made in a tank wagon. I am trying to reconcile these two statements.

Will you please do so, if you can?

A. No. We charged them the tank car prices because we sold them in tank car lots.

Q. I think you just stated, did you not, that they charged Crystal Pure Candy Company ten cents per hundredweight over your regular tank car price for tank wagon delivery?

A. Yes.

1066 Now, that is what I want to clear up. Tell me again why it was necessary to set it up as an alleged sale in tank cars when the Crystal Pure Candy Company was interested in not paying any more than at least the same price that Hubinger or somebody else was offering it to them; I mean, the Crystal Pure Candy Company was interested in their getting glucose at the same price as Hubinger or somebody else was offering the glucose to them.

A. Well, as I have stated before several times, it was a competitive condition and the only way we could meet that price was to give them the tank car price, which was then being offered them, and that is what we did offer to them, and we sold them in tank car lots. It was a tank car transaction, I am trying to make that very clear to you. Those tanks were held on the track and later, on request of the purchaser, delivered to them through our warehouse.

Q. On what track?

A. I have said that before, our Argo, Illinois, track. That is in the record about four times.

By Mr. Layton:

Q. You said the Argo, Illinois, track?

A. That is right.

By Mr. Hier:

Q. The tank cars Hubinger offered Crystal Pure Candy Company, it was reported to you, they were offered to Crystal Pure Candy Company, it was as a matter of 1067 fact, to be the tank car price in tank wagon delivery?

A. It was the tank car price.

Q. But your sales to Crystal Pure Candy Company were made at the tank wagon price?

A. They were tank car prices plus ten cents for cartage.

Q. Which, in effect, was the tank wagon price?

A. No.

Q. So that you were in, in effect, meeting Hubinger competition?

A. No.

Q. So that you were not, in effect, meeting Hubinger competition, then, would you say?

A. It is like I told you.

Q. Or this competitive price condition?

A. Tank cars at the tank car price, and on extended deliveries; on all extended deliveries.

Q. Now, then, you say that you were meeting Hubinger's offer to the Crystal Pure Candy Company for glucose at tank car prices?

A. Yes, and—

Mr. Hall (Interposing): On extended deliveries, he said.

By Mr. Hier:

Q. Well, take the whole scheme—

1068 A. Well?

Q. You sold Crystal Pure Candy Company at ten cents over the tank car prices?

A. Yes, to cover the cost of cartage.

Q. Certainly, but did Hubinger have that cost of cartage in there, also?

A. Yes.

Q. So that you were not meeting the Hubinger price in offering the Crystal Pure Candy Company glucose on that basis?

A. Yes, we were. I do not think you understand.

Q. If you were ten cents over Hubinger's price, how were you meeting their price?

A. Hubinger offered them glucose at tank car prices, and we offered the Crystal Pure Candy Company glucose at tank car prices. I do not think that Hubinger got any of that particular business to which I now refer, certainly not the business that we sold them. Now, if Hubinger had received that business, I feel quite sure they would have added cartage, too.

Crystal Pure Candy Company never would have given us the business if it were not because of our meeting the competition.

Q. You sold glucose to the Crystal Pure Candy Company in March, April, and May of 1937, at the regular tank price that you sold other glucose in tank wagons, did you not?

1069 A. Yes, sir.

Q. So, where was Crystal Pure Candy Company getting any advantage by dealing with you in that way; any competitive advantage?

A. We met that condition.

Q. Yes?

A. We met that condition and billed the tank cars at the tank car price, and the cars were held on our siding at Argo, Illinois, and, later, deliveries were made to Crystal Pure Candy Company through our filling station, and for which a cost or charge of ten cents per hundred pounds was made for cartage.

Q. Was Crystal Pure Candy Company told at the time of the sale that they would be charged ten cents per hundred weight for delivery in tank wagons?

A. I presume so.

Q. You do not know?

A. I am quite sure, but I cannot be positive.

Q. So that the Crystal Pure Candy Company knew that, though they were buying by the tank car method, that you have related here, that they were going to pay on March 25, 1937, tank wagon prices?

A. I would not say so. I have explained to you what the actual transaction was.

Q. Your statement is that Hubinger offered them 1070 glucose at tank car prices in tank car lots, I mean, at tank car prices?

A. Yes, sir.

Q. That is the competitive situation you were meeting?

A. Yes.

Q. Now, is the same thing true of the Union Starch and Refining Company?

A. Yes.

Q. The information you have is that Union Starch and Refining Company was offering glucose to your own customers, or to any customers, for that matter, in tank car lots at tank car prices, but obviously, deliverable in tank wagon lots?

A. Yes, sir.

Q. That price would be ten cents under the tank wagon price, would it?

A. The tank car price plus the cost of either putting it through their filling station, or else ten cents to cover the cartage.

Q. In either event, Mr. Mueller, the charge for delivery or cartage, as you wish to put it, was the same, either by Hubinger or by the Union Starch and Refining Company, as it is with you?



A. I would say so.

Q. That is, it was ten cents in any event?

A. Yes.

1071 By Mr. Layton:

Q. With your permission, Mr. Mueller, and hoping you will be patient with me, I would like to develop one question that has relation to the cars at Argo, Illinois.

A. Yes.

Q. As I understand it, the seven cars, the numbers of which appear in the record, were sold to the Crystal Pure Candy Company on 3-25-37?

A. To the best of my recollection, yes.

Mr. McCollester: Can you state, for my own information, where the numbers are to be found in the record?

Mr. Hall: Is it Commission's Exhibit No. 127?

Mr. Layton: No. They appear in the record at Pages Nos. 729 and 730.

Mr. McCollester: That is Mr. Cull's testimony?

Mr. Layton: Yes.

By Mr. Layton:

Q. Those seven cars; those seven tank cars together with, I have forgotten how many tank wagons, were sold to the Crystal Pure Candy Company on 3-25-37; that is correct, is it, Mr. Mueller?

A. That is right.

Q. Now, were those tank cars loaded at Argo, Illinois?

A. Yes.

1072 Q. When were those tank cars loaded at Argo, Illinois? How long did they lie on your siding there?

A. I have no record of that here.

Q. Well—

A. I believe you have a record of that, already.

Q. Now, let's just take the last one, CCLX 508, as shown by exhibit, Commission's Exhibit No. 158-B to have been shipped to the Crystal Pure Candy Company on 6-30-37; June 30, 1937.

A. Yes.

Q. It is your testimony, now, about these cars being on the siding. How long did that car remain on the Argo siding after 3-25-37?

A. I do not know. I will have to get the date it was billed. Have you got the date it was billed?

Q. June 30, 1937.

A. That would indicate that the car was billed on June 30, 1937.

Q. It did not stay on the siding at all? Is it not true, as a matter of fact, that these cars were billed in the regular manner at Argo, Illinois, and shipped to your Chicago place, emptied in your Chicago vats, and after being emptied therein, this corn syrup was drawn from those vats in the same manner that it always was?

A. No, that is not right.

Q. Explain the difference, please. Also, explain 1073 the dates involved.

A. I would have to check up on this matter.

Q. Explain the facts now, particularly with reference to the physical facts. What was the difference between the type of service the Crystal Pure Candy Company got on the tank wagons which it ordered and received, as such, from the Chicago warehouse, and those which it ordered in the guise or form of tank cars and which it subsequently received from tank wagons?

Mr. McCollister: I submit that the witness has explained this several times in the record already.

Mr. Layton: You will have to put up with the inability of counsel to grasp that. So this may be shortened as much as possible, if you have gotten it in the record already, if you can point out in the record where the answer to that appears, I would be glad to have it.

Trial Examiner Hornor: It has not been clear to me.

Mr. McCollister: He testified that the c.s.u. was loaded in tank cars, and stored at the Argo plant.

Mr. Layton: I am taking up with him specifically this car CCLX 508, which you say was ordered on 3-25-37, and shipped on June 30, 1937.

By Mr. Layton:

Q. Do you know what the facts are as to that car?

1074 A. Not without looking it up.

Q. Would you not say that they are relatively the same facts as to any other cars?

A. As I explained, the tanks are filled and billed to the buyer, and they are allowed to remain on the siding at our plant at Argo.

Q. How long did they remain there?

A. Until the customer orders another delivery. In other words, when he is ready for more corn syrup, he will request delivery and the tank is moved over to our warehouse, put into our storage system, and deliveries made then on until the weight of that tank is delivered in wagons.

Q. This car CCLX 508, which you say was ordered March 25, and which was shipped, according to Commission's Exhibit No. 158-B, June 30, 1937, is shown to have been shipped in tank wagons out of your vats, the first shipment was not taken in until July 26, 1937, as shown by Commission's Exhibit No. 157-E?

Mr. Hall: How do you get that?

Mr. Layton: May we have a five-minute recess, please?

Trial Examiner Hornor: We will have a five-minute recess.

(A five-minute recess was taken.)

Trial Examiner Hornor: Proceed.

1075 By Mr. Layton:

Q. Commission's Exhibit No. 157-E, Commission's Exhibit No. 157-H, Commission's Exhibit No. 157-K, and Commission's Exhibit No. 159-B, show tank wagons shipped ex that car CCLX 508, so that glucose must have remained in your car—he ordered it out, apparently, June 30, as is shown by the record, so he did not take anything from that, according to your record, until July 26.

A. I did not say he ordered this out on June 30. I said these tanks were on our siding.

Q. When?

A. The date of this billing, June 30.

Q. The date of this billing, you say that is when it was filled?

A. That is when it was filled.

Q. And it went on to Chicago immediately?

A. Not immediately.

Q. When did it go on to Chicago?

A. Possibly three or four days before the date of the first invoice.

Q. You think this car, CCLX 508 having been invoiced on June 30, was filled on June 30, put on the siding at your plant at Argo, Illinois, and remained on the siding still, as is shown by Commission's Exhibit No. 157-E, it remained there over a month?

1076 A. Yes, sir.

Q. That car remained on your siding, CCLX 508, remained on your siding at Argo, Illinois, for over a month; and until July 26, 1937, and the date that your first tank wagon went out on that car?

A. Yes.

Q. A whole month.

A. Yes, sir.

Q. That car went in on July 27—July 26, and it was dumped into your tank room, was it?

A. Yes.

Q. At Chicago?

A. At Chicago.

Q. On July 26, and one tank car was taken—one tank wagon was then taken out?

A. That would indicate so.

Q. And would you say the same thing would be true of all the rest of these?

A. Yes.

Q. Finally, now, I think I have it straight, that during this operation that the time during which these cars remained on the siding at Argo, Illinois, was from the date of the invoice until the date of the first tank wagon, or approximately the first tank wagon delivery, ex that car?

Mr. McCollester: It might have been a day or two before that.

1077 The Witness: Yes.

Mr. Layton: Yes, yes.

Now, just a minute, Mr. Examiner, if I might have a short recess?

Mr. Hier: If you want to examine some records, I have a few questions I would like to ask the witness during the meanwhile.

Mr. Layton: All right.

By Mr. Hier:

Q. Mr. Mueller, you mentioned that there were two things involved in this selling of tank cars and delivery in tank wagons, one was price, and the other was extended deliveries; is that what you said a moment ago?

A. Yes.

Q. That was the only way you could take care of it?

A. Yes.

Q. In other words, the only way you could give the tank wagon buyer the advantage of a price before the increase took effect was, as Mr. Cull put it, I might say, "protect his requirement," was to bill him for tank cars; is that right, Mr. Mueller?

A. Would you mind repeating that, please?

Q. Yes. In other words, the only way you could give these tank wagon buyers the advantage of the price before

the increase takes effect, or, as Mr. Cull put it, "protect his requirements," was to bill him for tank cars, Mr. Mueller; is that right?

A. That is the only way I know of.

Q. Now, then, was the practice of selling in tank car lots or at least invoicing in tank car lots, and delivery in tank wagons, was that extended to barrel buyers?

A. No.

Q. Or drum buyers?

A. No.

Q. They paid the advanced price?

A. Well, now, no. They stored it. They have facilities for storing up barrels and drums.

Q. If they bought after the price increase went into effect, they paid the increased price?

A. Yes, but they are allowed to come in before the price advance.

Q. Now, will you cite an example of any barrel buyer or drum buyer who booked, on March 25, 1937, his requirements for four solid months?

A. I do not know. I can look through our records and check it up.

Q. Would you say there were any such instances?

A. I do not know.

Q. You would not say there were or were not?

1079 A. I would not say. I do not know.

Q. As a matter of fact, most of these buyers of glucose in small containers, were not allowed to book a comparative amount for future requirements, such as tank car buyers were; is that right?

A. They were allowed to buy as much as they wanted to specify.

Q. Regardless of their requirements?

A. I would not say that. If they went to an extreme, naturally, we would question it, but we did not refuse to accept orders from the barrel or drum buyers before the advance in price.

Q. You would not tolerate a delivery of containers, such as barrels or drums, as much as four months after the increase?

A. I do not know at that particular time whether we did or not.

Q. As a matter of fact, Mr. Mueller, I believe Mr. Cull testified, and counsel may correct me if I am inaccurate,



that Commission's Exhibit No. 121, which is without any sub-letter, and which is a sheet on which is printed, "Bookings"; that sheet was not used except for tank car purchasers; is that correct?

A. I do not know.

Q. You are familiar with this?

A. I do not know. I have never seen that form. That is a detail handled by our outside men.

1080 Q. You do not know whether this form is used at all or not?

A. I do not know.

Q. These sales, or at least, these invoicings in tank car lots, Mr. Mueller, are reported to the organization of which Mr. Moore is secretary, as sales of tank cars, or as sales of tank wagon lots?

A. They are reported as sales, as it is represented there, if it is a tank car sale it is reported as a tank car sale.

Q. It is reported as a sale of tank car glucose, and if this is represented here as a tank car sale?

A. Yes.

Q. Anyone seeing those sales would assume it is a sale in tank car lots?

Mr. McCollester: That is what it is.

The Witness: Yes, and so it should be.

By Mr. Hier:

Q. Now then, we have taken up 1937.

A. Yes.

Q. Now, have you been selling or invoicing any tank cars and delivering in tank wagon facilities since then?

A. I do not think so.

Q. You stopped in 1937?

A. Yes.

1081 Q. Did you stop it at the time of the precipitate decline of fifty-five cents on July 22, 1937, or shortly after that, Mr. Mueller?

A. I do not recall.

Q. Did you—

A. I do not recall.

Q. Your best recollection is that you have sold no glucose for delivery in tank wagons and invoice the sale in tank cars since the summer of 1937?

A. I do not remember any such sales.

Q. Have your competitors offered to sell glucose that way, since?

A. I have heard of it now and then.

Q. You have heard of it?

A. Yes.

Q. You do not act or did not act upon it?

A. I did not act upon it.

Q. You did not think it was necessary to hold your competition?

A. I did not say that.

Q. You did not act on it?

A. No. We did not act on it.

1093 COMMISSION'S EXHIBITS NOS. 1-A TO 1-K.

AGREEMENT made this 21st day of April 1927 between CORN PRODUCTS REFINING COMPANY, a New Jersey corporation, hereinafter called "Seller", party of the first part, and HURON MILLING COMPANY, a corporation of Michigan, hereinafter called "Buyer", party of the second part:

WHEREAS, the Buyer is a producer of various starches made from wheat, corn, and other raw materials, and in the conduct of its business has developed certain formulae and methods for the manufacture of certain specialties from such starches and believes that because of the comparatively limited capacity and disadvantageous location of its plant at Harbor Beach, Mich. it would be better enabled to substantially increase its business and more successfully meet the competition of other manufacturers of similar products by purchasing its corn starch requirements from one of the substantial producers of that commodity, and

WHEREAS, the Seller is a substantial producer of corn starch and has facilities, equipment, and economies of operation far superior to those of the Buyer for the manufacture and shipment of all the corn starches and specialties made therefrom which are produced by the Buyer and is willing to supply the Buyer with its requirements of the products covered by this contract at the price and upon the terms hereinafter provided:

Now, THEREFORE, in consideration of the premises the parties hereto do hereby agree as follows:

1. *Quantity.* Seller agrees to manufacture and sell to Buyer or on its order, and Buyer agrees to purchase from Seller, Buyer's entire requirements of thin boiling pearl, chlorinated and other special starches, including 1094 Hercules gum, up to a maximum of Thirty Million (30,000,000) pounds per annum during the term of this agreement; provided, however, that the term "Buyer's requirements" as used herein shall not be construed to include any thin boiling starch which may be manufactured by Buyer from corn ground in its own plant.

2. *Quality.* Such of the foregoing products as are now manufactured by Seller shall be its usual standard quality; other products to be manufactured by Seller hereunder

shall be made according to and in compliance with specifications, formulae, and manufacturing methods therefor to be furnished by Buyer.

3. *Shipments.* To destinations as ordered by Buyer.

4. *Deliveries.* F. O. B. cars at any of Seller's factories at Seller's option, freight adjusted to Chicago basis. In case of shipment in mixed cars with other products of Seller, Buyer to be charged proportionate cost of actual freight, cartage, and warehousing.

5. *Price.* To be calculated on an estimated base price of \$1.80 per one hundred pounds for thick boiling pearl starch (12% moisture) f.o.b. cars, Chicago, in bulk, when Seller's

cost of corn at Argo (16% moisture) is 70¢ per bushel; price for feed (Chicago) is \$28 per short ton; and price of crude corn oil (Chicago) is \$8.00 per 100 pounds.

Such base price of thick boiling pearl starch shall be increased at the rate of 3¢ per 100 pounds for each 1¢ per bushel increase in Seller's cost of corn, and decreased at the same rate per 100 pounds for decrease of 1¢ per bushel in such cost of corn.

Such estimated cost price for thick boiling pearl starch shall also be increased at the rate of 2¢ per 100 pounds for each decrease of \$1.00 per ton in Seller's Chicago price for feed, and decreased at the rate of 2¢ per 100 pounds for each increase of \$1.00 per ton in Seller's Chicago price for feed.

1095 Such base price of thick boiling pearl starch shall also be decreased at the rate of 4¢ per 100 pounds for each increase of 1¢ per pound in Seller's price for crude corn oil, and increased at the rate of 4¢ per 100 pounds for each decrease of 1¢ per pound in such price of crude corn oil.

Such estimated base price of thick boiling pearl starch shall also be adjusted up or down with each corresponding increase or decrease of 10¢ per 100 pounds finished product in Seller's cost of coal, which is normally \$3.00 per ton, and/or labor, which is normally 60¢ per hour in Seller's wet starch house.

These adjustments to be at the rate of 5¢ per 100 pounds of starch for each \$1.00 increase or decrease per ton of coal, and at the rate of 1¢ per 100 pounds of starch for each 2¢ per hour increase or decrease in cost of labor.

In case finished product analyzes starch of greater or less than 12% moisture, estimated base price of thick boiling starch to be adjusted accordingly.

The estimated base price of thick boiling pearl starch (12% moisture) shall, however, never exceed Seller's average monthly net market price for such product, exclusive of packages.

All bags, barrels, cartons, packages, etc. to be added at cost plus actual packing cost.

Buyer agrees to pay Seller for all products manufactured hereunder and delivered to Buyer, or on its order, the following differentials over the base price of thick boiling pearl starch as above estimated, as follows:

Thin boiling pearl starch (12% moisture) 35¢ per 100 pounds.

Thick or thin crystal starches, either machine or hand packed, 45¢ per 100 pounds.

Large crystals requiring about two weeks to manufacture 55¢ per 100 pounds.

Hercules gum and chlorinated starches at a differential above price of thin boiling pearl to be established and based upon Seller's difference in cost of manufacture between such products.

1096 6. In case buyer's requirements of thin boiling and chlorinated starches shall be in excess of 30,000,000 pounds per annum because of its sales of Hercules gum exceeding 10,000,000 pounds per annum, Seller agrees to manufacture and sell to Buyer an additional quantity of Hercules gum up to a maximum of 10,000,000 pounds per annum at a differential over the base price of thick boiling pearl starch as fixed and adjusted in Paragraph 15 hereof corresponding to the differential above the price for thin boiling pearl starch then in effect for Hercules gum under Paragraph 5 hereof, or to deliver to Buyer a sufficient quantity of thick boiling pearl starch for the manufacture of such excess quantity of Hercules gum at the estimated base price for thick boiling pearl starch as provided in



Paragraph 5 hereof, and subject to the same adjustments as therein specified.

7. In case Buyer desires to manufacture any thin boiling or chlorinated starches at its plant at Harbor Beach, Mich., Seller agrees to deliver to Buyer up to a maximum of Five Million (5,000,000) pounds per annum of thick boiling pearl starch of Seller's normal standard quality at Seller's estimated base price for thick boiling pearl starch as fixed and subject to the adjustments as specified in Paragraph 5 hereof.

8. In the event that Buyer shall satisfy Seller that competition of other manufacturers has forced Buyer to sell any of such special starches during any calendar month at prices which shall average less than 15¢ per 100 pounds over the price charged by Seller for such product hereunder during such month, Seller shall reduce its price on such products to such sum as shall equal 15¢ per 100 pounds under Buyer's average selling price obtained there-  
1097. for during such month, provided, however, that Seller shall not be required to make any reduction which would bring its selling price for such products more than 30¢ per 100 pounds under a sum equal to the base estimated price of thick boiling pearl starch, plus the differential applicable to such product hereunder.

9. *Inspection.* All special starches manufactured by Seller under formulae, processes, or manufacturing methods supplied by Buyer shall be made under the supervision of a representative of Buyer who shall at all times be given free access to Seller's plant for such purpose and authorized to approve the quality of such products before delivery. Such inspection and approval shall not, however, relieve Seller from responsibility for defects or inferior quality in any of such products not discoverable by ordinary inspection and/or due to the failure of Seller to accurately follow the instructions for the manufacture thereof given by Buyer.

10. It is understood that the secret specifications, formulae, and manufacturing methods which shall be disclosed to Seller by Buyer, in carrying out the provisions of this contract, are the exclusive property of Buyer and that Seller will not use any of such specifications, formulae, or manufacturing methods, either directly or indirectly, in

the manufacture of any of such products for itself or for others, nor disclose any thereof to any other person, firm, or corporation and that this clause of this agreement shall be binding during the term of this contract and after the termination thereof. Provided, however, that nothing herein contained shall be construed to prevent Seller from manufacturing and selling similar products under any formulae, processes, or methods which it may now own or which may become commonly known or be acquired from others, or from using similarly made products as an ingredient in or base material for the manufacture of other products not now made by Buyer.

1098 11. Seller agrees to manufacture and hold in stock reasonable quantities of the products to be made by Seller under the specifications, formulae, or manufacturing methods furnished to it by Buyer hereunder. Buyer shall, however, from time to time notify Seller of the quantities of such respective products required to be kept in stock, which total quantities, however, shall at no time exceed two months' normal requirements of special starches and one month's normal requirements of thin boiling.

12. Seller shall not be liable for deliveries under this contract in case of strikes, shortage of cars, corn or fuel, or for any other reason beyond its reasonable control, but in case Seller is not able to promptly fill orders for all of its customers Seller agrees to give Buyer equal preference in shipments and fill Buyer's orders as promptly as possible, having due regard to all of Seller's customers.

13. Seller agrees to furnish Buyer monthly statements showing the stocks of products held by Seller for Buyer's account on the last day of each preceding month.

14. Seller further agrees to sell to Buyer and Buyer agrees to purchase from Seller Buyer's entire requirements of ordinary thick boiling pearl and powdered corn starches and edible pearl and powdered starches up to a maximum of Twenty Million (20,000,000) pounds per annum of the usual standard quality manufactured by Seller. Provided, however, that the term "Buyer's requirements", as used herein, shall not be construed to include any thick boiling pearl starch which may be manufactured by Buyer from corn ground in its own plant.

Shipments and deliveries to be made in the same manner as hereinabove provided with respect to thin boiling pearl and other special starches.

- 1099 15. The price for thick boiling pearl starch, 12% moisture, to be paid by Buyer shall be \$2.00 per 100 pounds f.o.b. cars Chicago in bulk when Seller's cost of corn at Argo (16% moisture) is 70¢ per bushel; price for feed (Chicago) is \$28 per short ton; and price of crude corn oil (Chicago) is \$8.00 per 100 pounds.

Such base price of thick boiling pearl starch shall be increased at the rate of 3¢ per 100 pounds for each 1¢ per bushel increase in Seller's cost of corn, and decreased at the same rate per 100 pounds for decrease of 1¢ per bushel in such cost of corn.

Such estimated cost price for thick boiling pearl starch shall also be increased at the rate of 2¢ per 100 pounds for each decrease of \$1.00 per ton in Seller's Chicago price for feed, and decreased at the rate of 2¢ per 100 pounds for each increase of \$1.00 per ton in Seller's Chicago price for feed.

Such base price of thick boiling pearl starch shall also be decreased at the rate of 4¢ per 100 pounds for each increase of 1¢ per pound in Seller's price for crude corn oil, and increased at the rate of 4¢ per 100 pounds for each decrease of 1¢ per pound in such price of crude corn oil.

Such estimated base price of thick boiling pearl starch shall also be adjusted up or down with each corresponding increase or decrease of 10¢ per 100 pounds finished product in Seller's cost of coal, which is normally \$3.00 per ton, and/or labor, which is normally 60¢ per hour in Seller's wet starch house. These adjustments to be at the rate of 5¢ per 100 pounds of starch for each \$1.00 increase or decrease per ton of coal, and at the rate of 1¢ per 100 pounds of starch for each 2¢ per hour increase or decrease in cost of labor.

In case finished product analyzes starch of greater or less than 12% moisture, estimated base price of thick boiling starch to be adjusted accordingly.

Provided, however, that the price to be paid by Buyer hereunder for ordinary thick boiling pearl starch shall at no time be lower than 50¢ per 100 pounds below Seller's net market price for ordinary thick boiling pearl starch in bulk f.o.b. cars Chicago, and no higher than the net market price for ordinary pearl starch.

The price for edible pearl, ordinary powdered and edible powdered starches to be paid by Buyer shall exceed the price to be paid for ordinary thick boiling pearl starch 1100 as follows:

Edible pearl starch 2½¢

Ordinary powdered starch 10¢

Edible powdered starch 12½¢.

Provided, however, that the differential of edible pearl, ordinary powdered, and edible powdered starches over thick boiling pearl starch to be paid by Buyer hereunder shall at no time exceed Seller's current differential between such products in the general market.

16. Thick boiling pearl and powdered and edible starches to be delivered by Seller hereunder are sold for the use of Buyer in its own manufacturing business and not to be sold by it except as the same have been so modified and blended with other products that they have become different in type or working quality; provided, however, that the provisions of this paragraph shall not be applicable to the existing contract between Buyer and the Larkin Company of Buffalo, N. Y. relating to the sale of certain edible starches, or any similar renewal thereof.

17. For the purpose of determining Seller's cost of corn and price of crude corn oil at Chicago in making adjustments of base price of thick boiling pearl starch under the provisions of this contract shall be determined by the methods customarily used by Seller in the conduct of its business, which methods and the computations used therein shall at all times be open to inspection by a representative of the Buyer.

18. All deliveries made by Seller hereunder in any one month shall be invoiced to Buyer on the fifteenth day of the succeeding month, and paid for by Buyer within ten days from receipt of invoice.

19. This contract shall not be assignable by either party without the consent of the other.

1101 20. This contract shall commence on the 21st day of April 1927, and continue for the term of fifteen (15) years, and at the option of Buyer, to be exercised by giving written notice thereof to Seller on or before December 31st, 1940, may be extended for an additional period of ten (10) years, making twenty-five (25) in all.

IN WITNESS WHEREOF the parties hereto have caused these presents to be duly executed the day and year first above written.

CORN PRODUCTS REFINING COMPANY

By E. T. BEDFORD *Pt*

F. T. FISHER

*Sec'y*

HURON MILLING COMPANY

By GEO. J. JENKS *Pres*

J. C. JENKS

*Sec'y*



1102 It is hereby understood that the contract this day executed between the undersigned, relating to the purchase of certain starches by the Huron Company from the Refining Company, and which contract is to be submitted to the Department of Justice at Washington, shall not be binding upon either party hereto in case of the disapproval thereof by such Department.

Dated, April 22, 1927.

CORN PRODUCTS REFINING COMPANY

By E. T. BEDFORD, *Pt.*

F. T. FISHER  
*Secretary*

HURON MILLING COMPANY

By GEO. J. JENKS, *Prest.*

J. C. JENKS  
*Secretary*

New York, N. Y.

May 26, 1927.

The contract between the parties hereto, executed April 22, 1927, having been submitted to the United States Department of Justice, and said Department having determined that it finds no basis for action thereon in view of the agreement between the parties to amend paragraph numbered 1 thereof by adding thereto the following clause:

And provided further that if and when the aforesaid maximum of thirty million (30,000,000) pounds shall be reached, nothing herein contained shall be construed as prohibiting the Buyer from purchasing the aforesaid articles, or any of them, from whomsoever it chooseth.

Now, THEREFORE, the undersigned hereby agree to amend said paragraph as hereinabove recited, and hereby declare said contract to be in full force and effect as and from the 22nd day of April, 1927.

CORN PRODUCTS REFINING COMPANY

By G. M. MOFFETT  
Vice President

HURON MILLING COMPANY

By GEO. J. JENKS,  
President

## COMMISSION'S EXHIBITS NOS. 5-A TO 5-D.

PLANNED CORN CLOVER MEALCHICAGO BULK PRICES

1936

May 12th	\$23.00 - June	\$24.00 - July
June 9th	23.50 - "	24.50 - "
June 19th	24.50 - "	25.50 - July
June 24th	26.50 - July	
June 30th	27.50 - "	28.50 - August
July 6th	29.50 - "	30.50 - "
July 7th	31.00 - "	32.00 - "
July 8th	33.00 - "	34.00 - "
Aug. 12th	44.00 - September	
Aug. 14th	45.00 - "	
Aug. 19th	46.00 - "	
Sept. 1st	43.00 - "	
Sept. 22nd	40.00 - Sept. 40.25 - 1st $\frac{1}{2}$ Oct. \$40.50 - last $\frac{1}{2}$ Oct.	
Oct. 2nd	37.25 - 1st $\frac{1}{2}$ Oct. \$37.50 - last $\frac{1}{2}$ Oct.	
Oct. 7th	33.25 - "	33.50 - "
Oct. 14th	33.50 - last $\frac{1}{2}$ Oct. 33.75 - 1st $\frac{1}{2}$ Nov. \$34.00 - last $\frac{1}{2}$ Nov.	
Oct. 27th	35.00 - last $\frac{1}{2}$ "	35.25 - "
Oct. 30th	36.00 - "	36.25 - "
Nov. 9th	37.25 - First $\frac{1}{2}$ Nov. 37.50 - last $\frac{1}{2}$ Nov.	
Nov. 10th	39.00 - First $\frac{1}{2}$ Dec. 39.50 - last $\frac{1}{2}$ Dec.	
Dec. 2nd	41.00 - "	41.50 - "
Dec. 8th	41.00 - "	41.50 - "
Dec. 16th	42.50 - last $\frac{1}{2}$ Dec. 43.00 - 1st $\frac{1}{2}$ Jan. \$42.00 - 1st $\frac{1}{2}$ Jan. \$42.50 - last $\frac{1}{2}$ Jan.	
		43.50 - last $\frac{1}{2}$ Jan.

1937

Jan. 5th	43.00 - 1st $\frac{1}{2}$ Jan. 43.50 - last $\frac{1}{2}$ Jan. \$43.50 - 1st $\frac{1}{2}$ Feb. 43.50 - last $\frac{1}{2}$ Feb.	
Feb. 3rd	41.50 - February	
Feb. 9th	39.50 - last $\frac{1}{2}$ Feb. 39.75 - last $\frac{1}{2}$ Feb. \$40.00 - 1st $\frac{1}{2}$ Mar. 40.25 - last $\frac{1}{2}$ Mar.	
Feb. 24th	38.75 - last $\frac{1}{2}$ Feb. 39.00 - 1st $\frac{1}{2}$ Mar. \$39.25 - last $\frac{1}{2}$ Mar.	
Mar. 3rd	38.00 - 1st $\frac{1}{2}$ Mar. 38.25 - last $\frac{1}{2}$ Mar.	
Mar. 9th	36.00 - last $\frac{1}{2}$ "	36.25 - " and April
Mar. 25th	36.75 - March and April	
Mar. 29th	37.25 - "	
April 2nd	38.25 - April	
Apr. 5th	40.25 - April and May	
Apr. 6th	41.25 - "	
Apr. 9th	42.25 - "	
Apr. 27th	41.25 - "	
May 4th	39.25 - May and June	
May 25th	38.25 - "	
June 2nd	37.25 - June	
June 8th	34.75 - "	35.25 - July
June 15th	33.75 - "	34.25 - "
June 23rd	31.75 - "	32.25 - "
July 7th	32.25 - July	32.75 - Aug.
July 23rd	31.25 - "	31.75 - "
July 27th	29.25 - "	29.75 - Aug.
Aug. 3rd	28.75 - Aug.	29.00 - Sept.
Aug. 24th	26.75 - "	27.00 - "
Sept. 2nd	25.00 - Sept.	
Sept. 14th	24.00 - Sept. & October	
Oct. 18th	24.00 - Oct.	24.50 - Nov.
Oct. 28th	26.00 - "	26.50 - Nov.
Nov. 3rd	26.50 - Nov.	26.75 - 1st $\frac{1}{2}$ Dec. \$27.00 - last $\frac{1}{2}$ Dec.
Nov. 19th	27.50 - "	27.75 - " " 28.00 - " " "
Dec. 7th	26.75 - 1st $\frac{1}{2}$ Dec. 27.00 - last $\frac{1}{2}$ Dec. 27.00 - January	

FEDERAL TRADE COMMISSION  
Bulki Sample 623 EXHIBIT 5-A  
IN THE MATTER OF Corn Meal  
DATE 10/2/36 BY Report  
REPORT BY  
ETHEL E. FINNELL, Official Reporter

DIAMOND CORN GLUTEN MEAL - CONTINUED1937Dec. 9th \$27.75 1st  $\frac{1}{2}$  Dec. \$28.00 last  $\frac{1}{2}$  Dec. \$28.00 January1938

Jan. 11th	\$29.00 - January & February	
Jan. 12th	29.00 - " "	
Jan. 19th	30.00 - " "	
Feb. 15th	30.00 - February & March	
Mar. 1st	29.00 - March	
Mar. 15th	29.00 - March	\$29.50 - April
Mar. 17th	28.00 - " "	28.50 - " "
Mar. 24th	26.00 - " "	26.50 - " "
Apr. 12th	26.50 - April and May	
May 3rd	26.50 - May	\$26.75 - June
June 7th	25.75 - June	
June 14th	25.75 - June	26.00 - July
July 12th	26.50 - July	27.00 - Aug.
July 13th	27.50 - August	
Aug. 9th	26.50 - August	27.00 - Sept.
Aug. 15th	25.50 - " "	26.00 - " "
Aug. 23rd	24.50 - " "	25.00 - " "
Sept. 7th	24.00 - Septe.	
Sept. 13th	23.00 - Sept.	23.50 - October
Sept. 20th	24.00 - " "	24.50 - " "
Oct. 14th	22.50 - Oct. & 1st $\frac{1}{2}$ Nov.	\$23.00 - last $\frac{1}{2}$ Nov.
Nov. 9th	22.50 - 1st $\frac{1}{2}$ Nov.	\$23.00 - last half Nov. & December
Nov. 14th	23.50 - " " "	24.00 " " "

## FEDERAL TRADE COMMISSION

Sub. No. 3633 DIAMOND CORN GLUTEN MEAL

IN THE MATTER OF

DATE 12/2/38 WITNESS

REPORTER

ETHEL E. FARMER, Official Reporter

**BUFFALO CORN GLASS FIRM  
CHICAGO BULK PRICES**

<b>1936</b>			
May 12th	\$15.00 - June	\$16.00 - July	
June 9th	15.50 - "	16.50 - "	
June 19th	16.50 - "	17.50 - "	
June 30th	18.50 - July	19.50 - August	
July 6th	20.50 - "	21.50 - "	
July 7th	22.00 - "	23.00 - "	
July 8th	24.00 - "	25.00 - "	
July 10th	25.00 - "	26.00 - "	
July 16th	27.00 - "	28.00 - "	
July 21st	29.00 - "	30.00 - "	
July 30th	32.00 - August		
Aug. 3rd	35.00 - "		
Aug. 12th	35.00 - "	35.00 - September	
Aug. 14th	36.00 - "	36.00 - "	
Aug. 19th	36.00 - "	37.00 - "	
Aug. 20th	37.00 - "	38.00 - "	
Sept. 1st	35.00 - Sept.		
Sept. 22nd	32.00 - "	32.25 - 1st $\frac{1}{2}$ Oct.	\$32.50 - Last $\frac{1}{2}$ Oct.
Oct. 1st	29.25 - 1st $\frac{1}{2}$ Oct.	29.50 - Last $\frac{1}{2}$ Oct.	
Oct. 14th	27.25 - "	27.50 - "	\$27.75 - 1st $\frac{1}{2}$ Nov. \$28.00 - Last $\frac{1}{2}$ Nov.
Oct. 27th	28.00 - Last " "	28.25 - 1st " Nov.	\$28.50 - Last " "
Nov. 9th	29.25 - 1st " Nov.	29.50 - Last " "	
Nov. 10th	30.00 - 1st " Dec.	30.50 - "	
Dec. 2nd	31.00 - "	31.50 - "	
Dec. 8th	31.00 - "	31.50 - "	\$32.00 - 1st $\frac{1}{2}$ Jan. \$32.50 - Last $\frac{1}{2}$ Jan.
Dec. 16th	32.50 - Last " Dec.	33.00 - 1st " Jan.	\$33.50 - Last " Jan.
<b>1937</b>			
Jan. 5th	34.00 - 1st $\frac{1}{2}$ Jan.	34.50 - Last $\frac{1}{2}$ Jan.	\$35.00 - 1st $\frac{1}{2}$ Feb. \$35.50 - Last $\frac{1}{2}$ Feb.
Feb. 9th	33.00 - "	33.25 - "	\$33.50 - " " Mar. \$33.75 - " " Mar.
Feb. 24th	31.25 - Last " "	31.50 - 1st " Mar.	\$31.75 - Last " Mar.
Mar. 3rd	29.50 - 1st " Mar.	29.75 - Last " "	
Mar. 9th	28.50 - 1st " Mar.	28.75 - " " and April	
Mar. 12th	29.00 - "	29.25 - " " and April	
Mar. 19th	29.75 - March and April		
Mar. 25th	30.25 - "		
Mar. 29th	31.25 - "		
Apr. 5th	33.25 - April	" May	
Apr. 9th	34.25 - "	" June	
May 4th	34.25 - May		
May 25th	33.25 - "		
June 2nd	32.25 - June		
June 8th	29.75 - "	\$30.25 - July	
June 15th	28.75 - "	29.25 - "	
June 23rd	26.75 - "	27.25 - "	
July 7th	28.25 - July	28.75 - August	
July 23rd	27.25 - "	27.75 - "	
July 27th	26.25 - "	26.75 - "	
Aug. 3rd	25.75 - Aug.	26.00 - Sept.	
Aug. 24th	23.75 - "	24.00 - "	
Sept. 2nd	22.00 - Sept.		
Sept. 16th	21.00 - " and October		
Oct. 18th	21.00 - Oct. " " " November		
Nov. 3rd	21.50 - Nov.	21.75 - 1st $\frac{1}{2}$ Dec.	\$22.00 - Last $\frac{1}{2}$ Dec.
Nov. 19th	22.50 - "	22.75 - "	23.00 - "
Dec. 7th	22.75 - 1st $\frac{1}{2}$ Dec.	23.00 - Last " "	23.00 - January

**FEDERAL TRADE COMMISSION**  
 Under No. 3633  
 IN THE MATTER OF *Corn Producers*  
 Docket No. *1319*  
 WITNESSES *Raymond*  
 HENRY H. FARMER, Chief Reporter



BUFFALO CORN GLUTEN FEED - CONTINUED1937

Dec. 9th - \$24.00 - January

1938

Jan. 11th - \$25.00 - February  
 Feb. 15th - 24.00 - February and March  
 Mar. 1st - 23.00 - March  
 Mar. 15th - 23.00 - " \$23.50 - April  
 Mar. 17th - 22.00 - " 22.50 - "  
 Mar. 24th - 20.00 - " 20.50 - "  
 Apr. 12th - 20.90 - April and May  
 Apr. 26th - 19.50 - " "  
 May 2nd - 18.50 - May 18.75 - June  
 June 14th - 18.75 - June 19.00 - July  
 July 12th - 19.00 - July 19.50 - August  
 Aug. 9th - 18.50 - Aug. 19.00 - Sept.  
 Aug. 23rd - 17.50 - Aug. 18.00 - Sept.  
 Sept. 13th - 17.00 - Sept. 17.50 - Oct.  
 Sept. 20th - 18.00 - Sept. 18.50 - Oct.  
 Oct. 7th - 17.50 - Oct.  
 Oct. 14th - 15.50 - October and 1st  $\frac{1}{2}$  Nov. \$16.00 - last half Nov.  
 Oct. 18th - 15.50 - October \$16.50 - 1st half and last half Nov.  
 Nov. 9th - 16.50 - November \$17.00 - December

FEDERAL TRADE COMMISSION  
 Serial No. 3155 EXHIBIT, Case No. 1-10  
 IN THE MATTER OF Low Products  
 DATED 12/1/38 AT St. Louis  
 REPORTED BY W. H. H. H.  
 W. H. H. H., Official Reporter

1255

COMMISSION'S EXHIBIT NO. 25.

CORN PRODUCTS SALES COMPANY

17 Battery Place,—New York, N. Y.

January 18, 1938.

ALLIED MILLS, INC.,  
Board of Trade Building,  
Chicago, Ill.

Gentlemen:

We hereby agree to sell you and you agree to purchase from us fifteen thousand (15,000) tons of Buffalo Corn Gluten Feed and/or Diamond Corn Gluten Meal during the calendar year 1938 on the following terms:

1. You agree to place your orders with us within five (5) days after we have named our first market price for delivery during the next succeeding month.

2. The price to be paid by you on all shipments made in any calendar month for which your orders shall have amounted to twelve hundred (1200) tons shall be fifty cents (50¢) under the first market price named by us for delivery in such month in your market, guaranteed against our lower market price on date of shipment. For all shipments made in any calendar month for which your orders shall not have amounted to 1200 tons, the price shall be our regular market price on date of acceptance of order guaranteed as above.

In case we decline to accept your order for any months' shipments in whole or in part, the quantity not accepted may be purchased by you from other sources.

In the event that the aggregate of orders received from you during the calendar year 1938 shall not amount to 15,000 tons all discounts taken by you on shipments therefore made shall be refunded to us.

Our regular current terms shall apply on all shipments.

If the foregoing is satisfactory, kindly sign under the word "Accepted" at the bottom hereof and return promptly.

Yours very truly,

CORN PRODUCTS SALES COMPANY

By R. P. WALDEN  
Vice-President

Accepted:

ALLIED MILLS, INC.

By J. B. DeHAVEN

COMMISSION'S EXHIBIT NO. 26  
CORN PRODUCTS SALES COMPANY  
17 Battery Place, New York, N. Y.

November 1, 1938.

ALLIED MILLS, INC.,  
Board of Trade Building,  
Chicago, Ill.

Gentlemen:

We hereby agree to sell you and you agree to purchase from us, 15,000 tons of Buffalo Corn Gluten Feed and/or Diamond Corn Gluten Meal during the 12 months commencing November 1, 1938, on the following terms:

1. The price to be paid by you on all shipments made in any calendar month for which your orders shall have amounted to twelve hundred fifty (1250) tons shall be fifty cents (50¢) under the first market price named by us for delivery in such month in your market, guaranteed against our lower market price on date of shipment. For all shipments made in any calendar month for which your orders shall not have amounted to 1250 tons, the price shall be our regular market price on date of acceptance of order guaranteed as above.

2. Invoices rendered on shipment at our applicable market price to be paid forthwith by you in New York or Chicago exchange, we to refund to you deductions allowable on each month's shipments as promptly as practicable after the first of the next succeeding month.

3. In case we decline to accept your order for any month's shipments in whole or in part, the quantity not shipped may be purchased by you from other sources.

Our regular current terms shall apply to all deliveries.

If the foregoing is satisfactory, kindly sign under the word "Accepted" at the bottom hereof and return promptly.

Yours very truly,

CORN PRODUCTS SALES COMPANY

Accepted:

By R. P. WALPEN  
Vice President

ALLIED MILLS, INC.

By L. F. SPRINGER

1257

## COMMISSION'S EXHIBIT NOS. 27-A TO 27-C.

AGREEMENT made this 29th day of October, 1937, between CORN PRODUCTS SALES COMPANY, a corporation organized under the laws of the State of New Jersey, hereinafter referred to as "Seller", party of the first part, and COOPERATIVE GLF MILLS, INC., a corporation organized under the laws of the State of New York, hereinafter referred to as "Buyer", party of the second part, WITNESSETH:

1. Seller has sold to Buyer and Buyer has agreed to purchase from Seller and pay for 50,000 tons of Buffalo Corn Gluten Feed to be shipped during the twelve months commencing November 1, 1937, and ending October 31, 1938, upon the following terms and conditions:

Buyer shall have the option of taking not to exceed 10,000 tons of Diamond Corn Gluten Meal in lieu of an equal quantity of Buffalo Corn Gluten Feed during the above specified term.

*Shipments:* Not less than 2,500 tons of Buffalo Corn Gluten Feed and/or Diamond Corn Gluten Meal in each calendar month provided that Seller shall not be obligated to ship more than 6,000 tons of Buffalo Corn Gluten Feed nor more than 1,000 tons of Diamond Corn Gluten Meal in any one calendar month.

*Price:* On all orders received by Seller from Buyer within ten days after Seller names its first market price for Buffalo Corn Gluten Feed or Diamond Corn Gluten Meal for shipment during the next succeeding calendar month. Buyer shall pay such quoted price on the entire quantity specified in such orders, less 65¢ a ton on Buffalo Corn Gluten Feed and 75¢ a ton on Diamond Corn Gluten Meal. On all orders received by Seller after the expiration of said ten days Buyer shall pay Seller's regular market price for the respective products prevailing at the date of receipt of the order, less the allowances above specified.

1258. *Price Guarantee:* Seller's market price on shipments made each month is guaranteed against Seller's lower price in Buyer's market on date of shipment.

*Freight Adjustments:* Buyer to pay any advance in present prevailing freight rate in effect when shipment is made. If lower freight rate is in effect when shipment is made—Buyer to get the advantage.

**Terms of Payment:** Invoices to be rendered on shipment by Seller and to be paid forthwith by Buyer, in New York or Chicago exchange. Buyer may deduct from each invoice the allowances as provided in the Price Clause hereof, at the time of making payment, upon condition, however, that in the event Buyer does not take delivery of both the total quantity for which it is obligated during the term of this contract and the minimum quantity for which it is obligated in each calendar month, Buyer shall refund to Seller on demand all amounts so deducted from such invoices.

**Shipping Instructions:** Buyer shall advise Seller amount of deliveries required during next succeeding month within ten (10) days from the date that the Seller's first market price for that month's shipments is announced.

**Delays in Shipment and Delivery:** Seller shall in no case be held responsible for demurrage or storage charges at destination or any damages arising from delayed shipments caused by strikes, accidents, car shortages, inability to secure supplies or interruptions of manufacture beyond its control.

**General:** Invoices are to be rendered on the basis of factory weights. Seller reserves the right to ship from any factory and to select the routing. Seller shall not be responsible for the adaptability of the products for 1259 any specific purpose not specially and separately provided for herein.

All products delivered hereunder are principally for the use by the Buyer in the manufacture of mixed feeds and are not for resale except for distribution with mixed feeds through Buyer's own stores and its regular agency stores.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be duly executed the day and year first above written.

CORN PRODUCTS SALES COMPANY

By R. P. WALDEN  
Vice President

COOPERATIVE GLF MILLS, INC.

By F. A. McLELLAN  
Vice President



1260

COMMISSION'S EXHIBIT NO. 28

CORN PRODUCTS SALES COMPANY

17 Battery Place, New York, N. Y.

COOPERATIVE GLE MILLS, INC.,  
Board of Commerce Building,  
Buffalo, N. Y.

November 7, 1938.

Gentlemen:

We hereby agree to sell you and you agree to purchase from us, 30,000 tons of Buffalo Corn Gluten Feed during the 12 months commencing November 1, 1938, with an option on your part to take not to exceed 6,000 tons of Diamond Corn Gluten Meal in lieu of an equal quantity of Buffalo Corn Gluten Feed, on the following terms:

1. You agree to place your orders with us within 10 days after we have named our first market price for delivery during the next succeeding calendar month. The price to be paid by you on all shipments of Buffalo Feed and Diamond Meal made in any calendar month, shall be the first market price named by us for delivery in such month in your market, guaranteed against our lower market price on date of shipment, subject to the following deductions:

On monthly shipments of 1500 to 2499 tons—50¢ a ton allowance;

On monthly shipments in excess of 2500 tons—65¢ a ton allowance.

No deductions will be allowed on shipments amounting to less than 1500 tons in any calendar month.

2. Invoices rendered on shipment at our applicable market price to be paid forthwith by you in New York or Chicago exchange, we to refund to you deductions allowable on each month's shipments as promptly as practicable after the first of the next succeeding month.

3. In case we decline to accept your order for any month's shipments in whole or in part, the quantity not shipped may be purchased by you from other sources.

Our regular current terms shall apply to all deliveries.

Yours very truly,

CORN PRODUCTS SALES COMPANY

By R. P. WALDEN  
Vice President

Accepted:

COOPERATIVE GLE MILLS, INC.

By E. W. STUHR

1362 COMMISSION'S EXHIBIT NOS. 70-A TO 70-E.

AGREEMENT made this 12 day of July 1932, between CORN PRODUCTS REFINING COMPANY, a New Jersey corporation, hereinafter called "Seller", party of the first part, and THE KEEVER STARCH COMPANY, an Ohio Corporation, hereinafter called "Buyer", party of the second part:

WHEREAS, the Buyer is a producer of various starches made from wheat, corn, and other raw materials, and in the conduct of its business has developed certain formulae and methods for the manufacture of certain specialties from such starches and believes that because of the comparatively limited capacity and disadvantageous location of its plant at Columbus, Ohio, it would be better enabled to substantially increase its business and more successfully meet the competition of other manufacturers of similar products by purchasing its corn starch requirements from one of the substantial producers of that commodity, and

WHEREAS, the Seller is a substantial producer of corn starch and has facilities, equipment, and economies of operation far superior to those of the Buyer for the manufacture and shipment of all the corn starches and specialties made therefrom which are produced by the Buyer and is willing to supply the Buyer with its requirements of the products covered by this contract at the price and upon the terms hereinafter provided;

Now, THEREFORE, in consideration of the premises the parties hereto do hereby agree as follows:

1. *Quantity.* Seller agrees to manufacture and sell to Buyer and Buyer agrees to purchase from Seller, Buyer's entire requirements of Corn Starch Products up to a maximum of 20,000,000 pounds per annum. Provided, however, that Seller shall not be obligated to deliver in any period of three consecutive months more than thirty percent (30%) of such annual maximum requirements.

2. *Quality.* Such of the foregoing products as are now manufactured by Seller shall be its usual standard quality; other products to be manufactured by Seller here-  
1363 under shall be made according to and in compliance with specifications, formulae and manufacturing methods to be furnished by Buyer.

3. *Shipments.* To destinations as ordered by Buyer.

4. *Deliveries.* In bags or barrels F.O.B. cars at any of Seller's factories at Seller's option, freight adjusted to Chicago basis. In case of deliveries in mixed cars with other products of Seller, Buyer to be charged proportionate cost of actual freight, cartage and warehousing.

5. *Price.* For Corn Starch Products to be manufactured by Seller hereunder, the price shall be calculated on an estimated base price of \$1.90 per 100 pounds for thick boiling pearl starch (12% moisture) F.O.B. cars Chicago, in bulk, when Seller's cost of corn at Argo (16% moisture) is 70¢ per bushel, market price for bulk feed Chicago is \$28 per short ton, and market price of crude oil Chicago is \$8 per 100 pounds.

Such estimated base price of thick boiling pearl starch shall be

a. Increased at the rate of 3¢ per 100 pounds for each 1¢ per bushel in Seller's cost of corn, adjusted to a basis of 16% moisture content, and decreased at the same rate per 100 pounds for each 1¢ per bushel decrease in such cost of corn.

b. Increased at the rate of 2¢ per 100 pounds for each decrease of \$1.00 per ton in Seller's Chicago price for bulk feed, and decreased at the rate of 2¢ per 100 pounds for each increase of \$1.00 per ton in Seller's Chicago price for feed.

c. Increased at the rate of 4¢ per 100 pounds for each decrease of 1¢ per pound in Seller's Chicago price for crude corn oil in tank cars, and decreased at the rate of 4¢ per 100 pounds for each increase per 100 pounds in such price of crude corn oil.

d. Adjusted, up or down, with each corresponding increase or decrease of 10¢ per 100 pounds finished product in Seller's cost of coal, (which is normally \$3 per ton) and/or labor, (which is normally 60¢ per hour) in Seller's wet starch house. These adjustments to be at the rate of 2 1/4¢ per 100 pounds for each \$1.00 increase or decrease per ton of coal, and at the rate of 1¢ per 100 pounds of starch for each 5¢ per hour increase or decrease in cost of labor.

In case the finished product analyzes starch of greater or less than 12% moisture, the estimated base price of thick boiling pearl starch shall be adjusted accordingly.

1364 Buyer agrees to pay Seller for all Corn Starch Products manufactured hereunder and delivered to Buyer, or on its order, the base price for thick boiling pearl starch, as above estimated plus the following differentials:

Pearl starches modified as now made by Buyer (except Crystal Victor 20¢ per 100 pounds;

Thick or thin crystal starches, either machine or hand packed, 45¢ per 100 pounds;

Large crystals requiring about two weeks to manufacture 55¢ per 100 pounds.

Neither the estimated base prices for Thick Boiling Pearl starch as hereinabove provided, nor the differentials over such estimated base prices to be paid by Buyer, include bags, barrels, chemicals or other ingredients, which may be used in the manufacture or shipment of any starches to be delivered hereunder, and the actual cost of such containers, chemicals or other ingredients, together with the actual packing cost, shall be added to the purchase price on all deliveries.

6. For the purpose of determining Seller's cost of corn, price of bulk feed and crude corn oil at Chicago in making adjustments of base price of Thick Boiling Pearl Starch under any of the provisions of this contract, the methods customarily used by Seller in the conduct of its business shall be used, which methods and the computations thereof shall, at all times, be open to inspection by a representative of Buyer.

7. All Corn Starch Products to be delivered hereunder and to be manufactured by Seller under formulae, processes or manufacturing methods supplied by Buyer, are to be manufactured under the supervision of a representative of Buyer, who shall at all times be given free access to Seller's plant for such purpose, and who shall be authorized to approve the quality of such products before shipment. Such inspection and approval shall not, however, relieve Seller from responsibility for defects or inferior quality in any of such products not discoverable by ordinary inspection and/or due to failure of Seller to follow the instructions for the manufacture thereof given by Buyer.

1365 8. It is understood that the secret specifications, formulae, and manufacturing methods which shall be disclosed to Seller by Buyer, in carrying out the provisions of this contract, are the exclusive property of Buyer, and that Seller will not use any of such specifications, formulae, or manufacturing methods, either directly or indirectly, in the manufacture of any of such products for itself or for others, nor disclose any thereof to any other person, firm, or corporation and that this clause of this agreement shall be binding during the term of this contract and after the termination thereof. Provided, however, that nothing herein-contained shall be construed to prevent Seller from manufacturing and selling similar products under any formulae, processes, or methods which it may now own or which may become commonly known or be acquired from others, or from using similarly made products as an ingredient in or base material for the manufacture of other products not now made by Buyer.

9. Seller agrees to manufacture and hold in stock reasonable quantities of the Corn Starch Products to be made by Seller under the specifications, formulae, or manufacturing methods furnished to it by Buyer hereunder. Buyer shall, from time to time, notify Seller of the quantities of such respective products, required to be kept in stock, which total quantities, however, shall at no time exceed two months' normal requirements.

10. Seller agrees to furnish Buyer monthly statements showing the stocks of Corn Starch Products held by Seller for Buyer's account on the last day of each preceding month.

11. Seller shall not be liable for deliveries under this contract in case of strikes, shortage of cars, corn or fuel, or for any other reason beyond its reasonable control, but in case Seller is not able to promptly fill orders for all of its customers Seller agrees to give Buyer equal preference in shipments and fill Buyer's orders as promptly as possible, having due regard to all of Seller's customers.

1366 12. All deliveries made by Seller hereunder in any one month shall be invoiced to Buyer during the succeeding month, and paid for by Buyer within ten days from receipt of invoice.



13. In the event that Buyer's maximum requirements of Corn Starch Products shall exceed the quantity specified in paragraph 1 of this agreement, Buyer agrees to give Seller first opportunity to supply such excess requirements at the same price and terms offered by others. In case Seller is unwilling to accept such price and terms Buyer may purchase such excess requirements from other manufacturers.

14. This contract shall not be assignable by either party without the consent of the other.

15. This contract shall commence on the      day of      , 1932, and continue for the term of fifteen years, and at the option of Buyer, to be exercised by giving written notice thereof to Seller on or before      may be extended for an additional period of ten years.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be duly executed the day and year first above written.

CORN PRODUCTS REFINING COMPANY

By \_\_\_\_\_

THE KEEVER STARCH COMPANY

By \_\_\_\_\_

1369

COMMISSION'S EXHIBIT NO. 73

New York, May 22, 1933

Mr. C. J. Kurtz, President,  
Keever Starch Company,  
Columbus, Ohio.

Dear Sir:—

With reference to your conversation with Mr. Moran on clarifying the contract of July 12, 1932, this may be said by way of explanation.

Section 5, dealing with Price, about middle of page 3, states "Buyer agrees to pay Seller for all corn starch products manufactured hereunder and delivered to Buyer

the base price \_\_\_\_\_". I have underlined the words "and delivered" because we understand this to mean and it is our practice to apply the estimated base price for any given month to the deliveries made in that month without regard to conditions prevailing in the month when the goods were produced. Obviously the time of manufacture must be at the Seller's convenience to fit into the Seller's production schedules, and this of course is of no particular interest to the Buyer so long as reasonable amounts are kept available in accordance with contract.

In connection with the figuring of the base price for the deliveries in any given month, we use the cost of the corn ground during that month, also the market price for bulk feed and crude oil during that month. This is exactly the same procedure used in the other contract under which we are operating.

By the word "chemicals" in the paragraph under "Price" article 5, page 3, is meant all chemicals used for making Keever starches used in excess of the sulphuric and muriatic acids, and soda ash used in the manufacture of ordinary Thin Boiling starches, and covers such special chemicals as technical white oil, borax, etc., required for your products. This, I think, is in accordance with our original verbal understanding to base our price on ordinary Thin Boiling starch products and cover any additional expense for chemicals by direct charge for them.

Very truly yours,

Morris Sayre.

MS:F

Read and approved by A. C. Rossee, W. L. Moran, and  
F. H. Hall.

1370

## COMMISSION'S EXHIBIT NO. 74

THE KEEVER STARCH COMPANY  
Columbus, Ohio

May 24, 1933

Mr. F. M. Sayre, Vice-President,  
Corn Products Refining Co.,  
New York City.

Dear Mr. Sayre:—

I have your favor of the 22nd inst. with reference to my conversation with Mr. Moran on clarifying two features of Section 5 of the Contract dated July 12, 1932.

Your explanation of the basis on which we pay for starch and special chemicals is entirely satisfactory and clear to us, and we will attach your communication to our contract and consider it a part thereof. We believe these interpretations should be understood by both parties on such a long time contract, particularly the one applying to chemicals as our understandings were verbal.

Thanking you for your attention.

Yours very truly,

(Sgd) C. J. Kurtz,  
President.

408

Commission's Exhibit No. 118.

COMMISSION'S EXHIBIT NO. 118

C. P. &amp; NO.

**CORN PRODUCTS SALES COMPANY**CENTRAL BUILDING  
17 BATTERY PLACE  
NEW YORK

Date \_\_\_\_\_  
 New Business \_\_\_\_\_  
 Confirming Wire \_\_\_\_\_  
 Trade No. \_\_\_\_\_  
 Customers Order No. \_\_\_\_\_  
 Brokers No. \_\_\_\_\_

Dear Sir:

We are in receipt of your order through \_\_\_\_\_ for

FEDERAL TRADING CO.  
 Del. 3-23 11/18  
 18-16-11-11  
 DATE 10/9/40  
 RECEIVED  
 SHIPLEY

This is hereby confirmed upon the following terms and conditions:

Deliveries to be made as ordered subject to Seller's approval of Buyer's credit, before each shipment.

**SHIPMENT** F. O. B. cars at point of shipment freight prepaid in (carlots) to be made within 10 days from date of sale, unless otherwise stated above.**SHIPPING INSTRUCTIONS** To be furnished by Buyer within 2 days from date of sale and if not so furnished Seller has the option of making shipment within contract period, or to cancel contract without notice.**PAYMENT** 2% 10 days in New York or Chicago exchange due at Seller's New York office within 10 days from date of sales.

If at any time before delivery the financial responsibility of the Buyer becomes impaired or unsatisfactory to the Seller, Buyer should have failed to make payment for previous shipment in accordance with terms of sale, Seller may cancel any unshipped portion of the contract or require cash payment or satisfactory security before further shipment is made.

**DELAYS IN SHIPMENT** Seller shall in no case be held responsible for demurrage or storage charges at destination for any damages arising from delayed shipments caused by strikes, accidents, car shortage, inability to produce supplies or interruptions of manufacture beyond its control; but, if shipment is delayed beyond 10 days through Seller's default, Buyer is entitled to any lower market price of Seller in effect on date of shipment or Buyer may cancel delayed order by telegram or letter, provided same is received by the Seller before shipment of such order, otherwise order remains uncanceled.**ROUTING** Seller reserves the right to ship from any factory or point and select the routing. Every effort will be made to respect Buyer's wishes as to delivery lines where substantial reason is given. Buyer assumes risk of leakage and damage to goods in transit to carrier in good condition. Where shortage or damage is apparent on arrival, Buyer should always receipt for goods to the transportation company in damaged condition and notify Seller immediately.

No sales are binding upon this company until accepted in writing at the principal office of Seller in New York. Salesmen and local brokers are not empowered to execute or modify contracts for Seller.

The prepaid price herein named is subject to change either up or down, according to any advance or decline in the freight rate on any portion not shipped at the time such rate change becomes effective.

Seller not to be responsible for the adaptability of the goods to be delivered on this contract for any specific purpose, unless specially and separately provided for in this contract.

Any duty, excise or other tax or charge, Federal, State or Municipal, hereafter imposed on the products covered hereby, or in manufacture, refining or sale, shall be added to the price herein specified.

If our regular market price on date of arrival in your market of any shipment against this contract is lower than price at which such shipments are invoiced, you will have the benefit of such lower price.

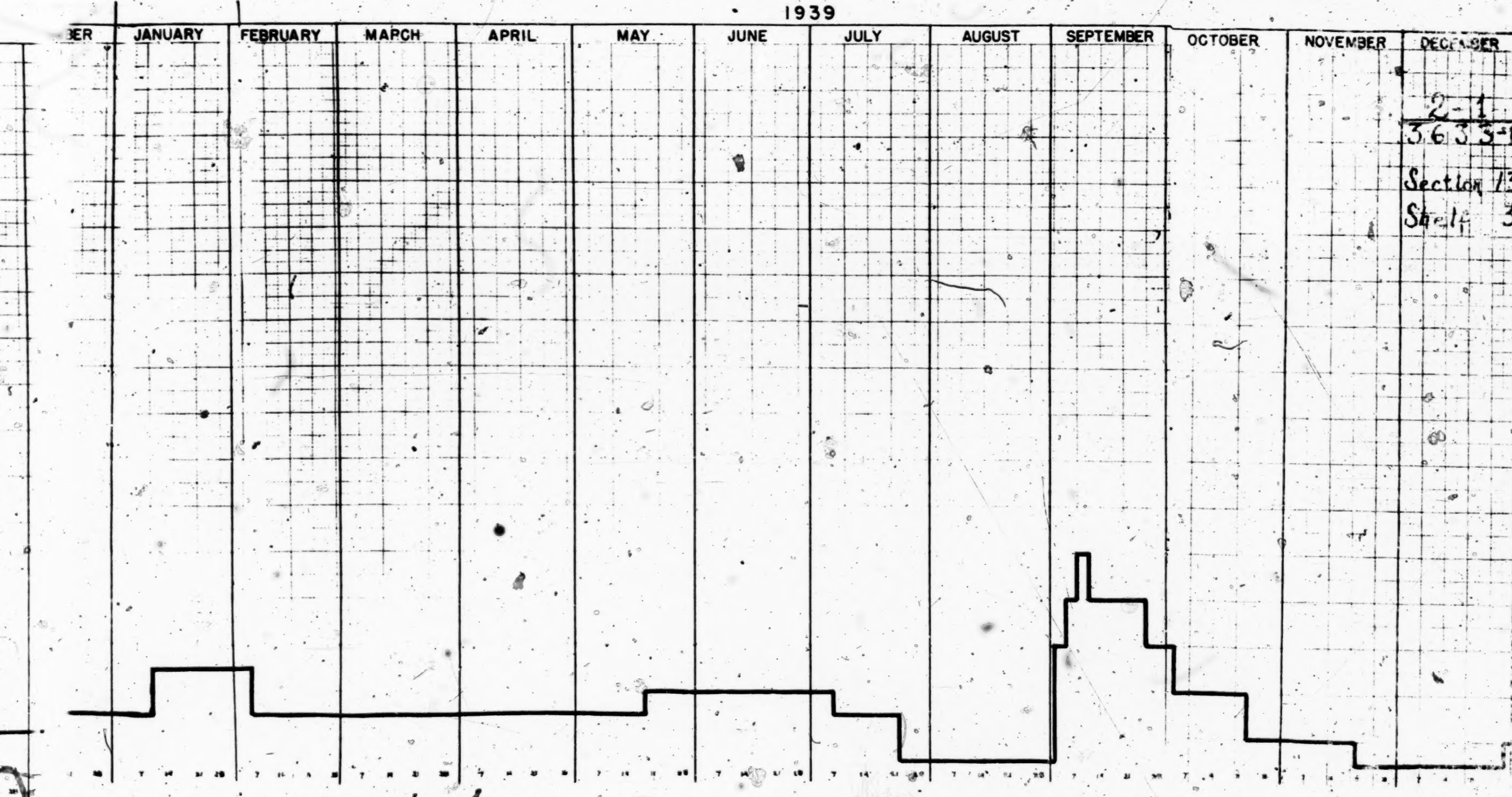
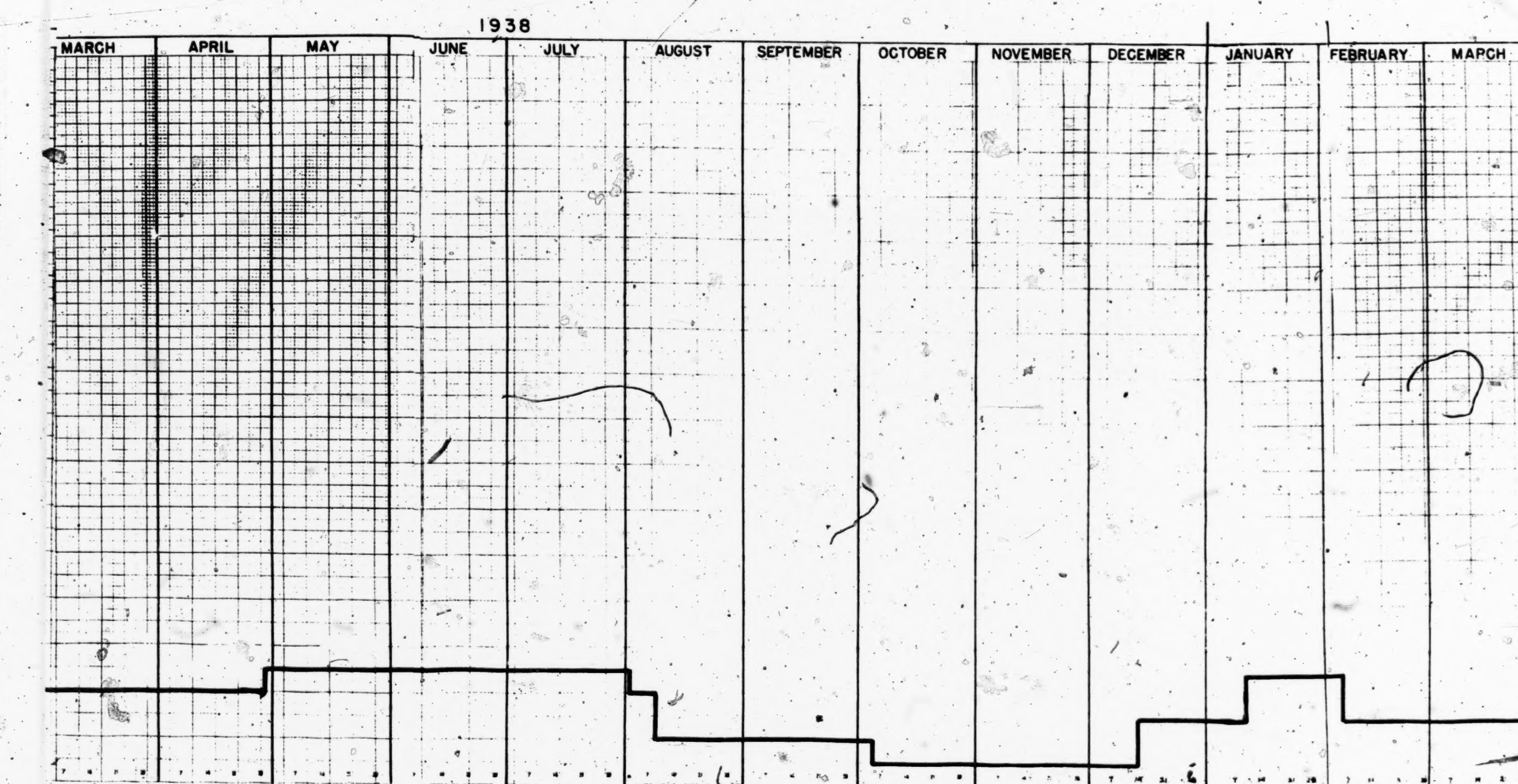
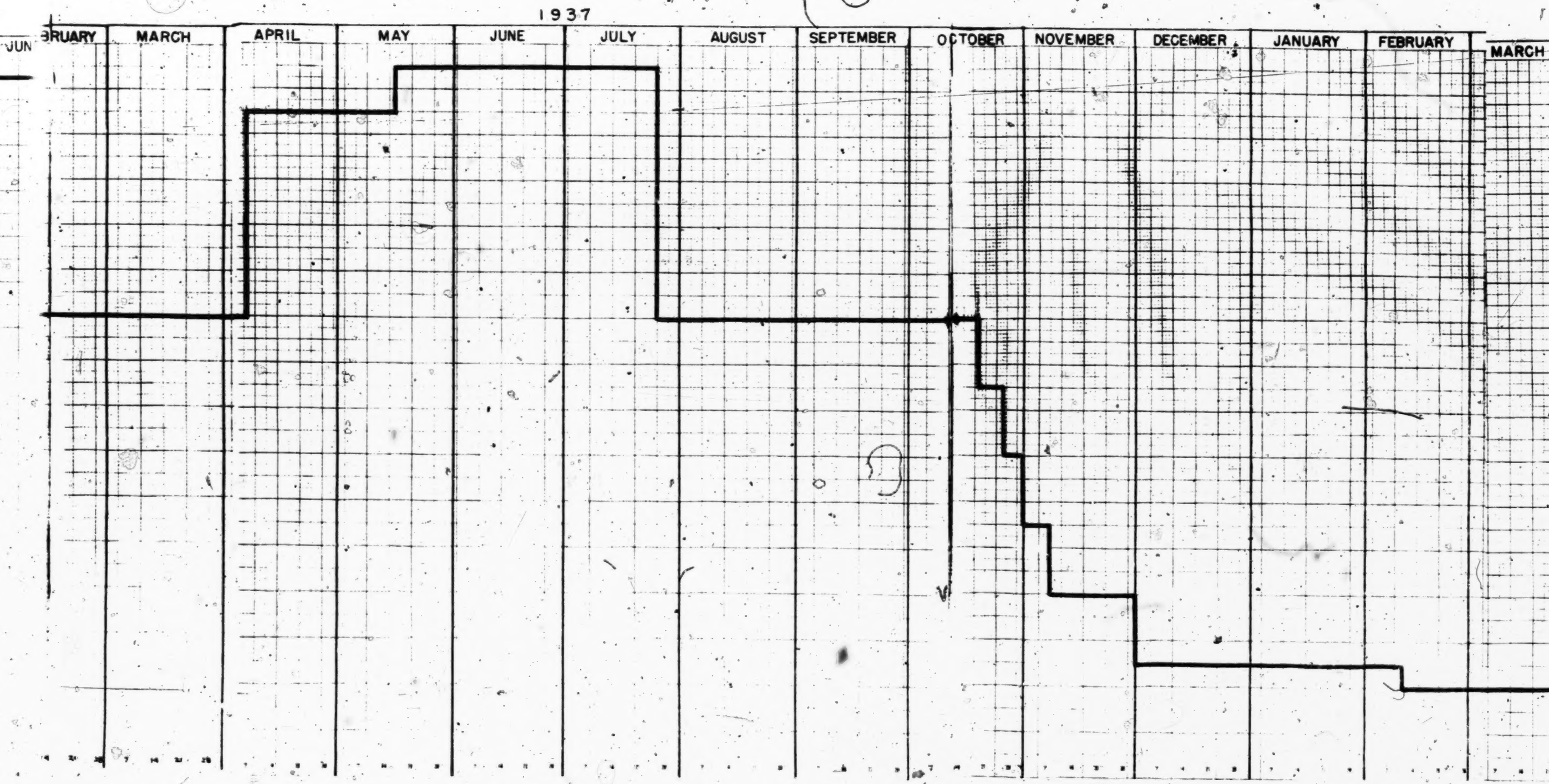
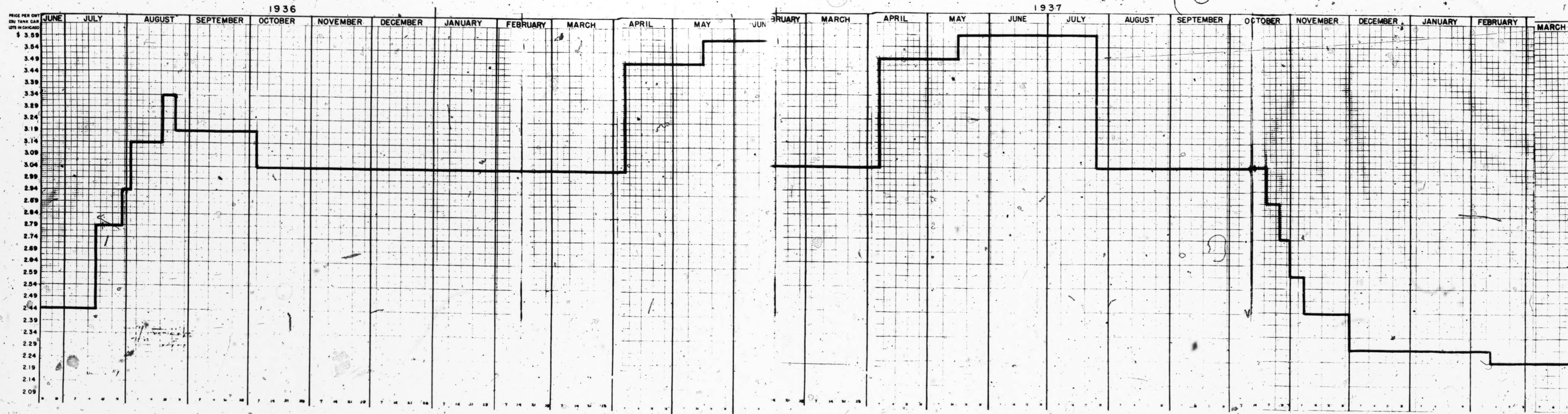
It is agreed that the goods sold under this contract are for consumption in the United States only and not for export.

Respectfully yours,

**CORN PRODUCTS SALES COMPANY**

Per \_\_\_\_\_





2-1  
3.633-1  
Section 13  
Sheet 3





410

Commission's Exhibit No. 120

COMMISSION'S EXHIBIT NO. 120

CORN PRODUCTS SALES COMPANY  
SHIPPING MEMO.

FORM 28

SHIPPING  
DATE

CONSIG  
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POB

SHIP  
WEIGHT

ROUT  
ING

DATE

PREPAID

COLLECT

LBS WAYBILL AS

TO INSURE A PARTICULAR DELIVERY, NECESSITY THEREFORE MUST BE SHOWN AND NAME OF RAILROAD

QUANTITY

SIZE

CODE OR  
GRADE

GRADE OR LABEL DESIRED

TRADE  
DIST

PRICE

3632  
Corn Products  
Unit 4, 4  
Shapiro

LOAD  
INVOICE TO

PORTION

FOR CREDIT DEPT USE

COPIES OF INVOICE TO

BRANCH  
OFFICE

BROKER

CUSTOMER  
CITY NO  
TRADE  
NO  
TERMS  
& CONDITIONS  
TERMS

DESTINA  
TION  
CITY  
TRADE

SALES  
NO  
CITY ORDER NO



COMMISSION'S EXHIBIT NO. 122

THEir STAFF WILL BE SHIFTING TO 24 HOUR COVERAGE 6/28/78 TO 28/78/78

[illegible]

See Same Exhibit Relating to Chicago Confectioners 6/12/30 to 11/21/30

	<u>DATE OF ORDER</u>	<u>DATE SHIPPED</u>	<u>COMMODITY</u>	<u>PRICE</u>
<p><i>Wm. J. Smith &amp; Sons</i></p> <p><i>12/9/30</i></p> <p><i>12/13/30</i></p> <p><i>12/15/30</i></p> <p><i>12/17/30</i></p> <p><i>12/19/30</i></p> <p><i>12/21/30</i></p> <p><i>12/23/30</i></p> <p><i>12/25/30</i></p> <p><i>12/27/30</i></p> <p><i>12/29/30</i></p> <p><i>12/31/30</i></p> <p><i>1/2/31</i></p> <p><i>1/4/31</i></p> <p><i>1/6/31</i></p> <p><i>1/8/31</i></p> <p><i>1/10/31</i></p> <p><i>1/12/31</i></p> <p><i>1/14/31</i></p> <p><i>1/16/31</i></p> <p><i>1/18/31</i></p> <p><i>1/20/31</i></p> <p><i>1/22/31</i></p> <p><i>1/24/31</i></p> <p><i>1/26/31</i></p> <p><i>1/28/31</i></p> <p><i>1/30/31</i></p> <p><i>2/1/31</i></p> <p><i>2/3/31</i></p> <p><i>2/5/31</i></p> <p><i>2/7/31</i></p> <p><i>2/9/31</i></p> <p><i>2/11/31</i></p> <p><i>2/13/31</i></p> <p><i>2/15/31</i></p> <p><i>2/17/31</i></p> <p><i>2/19/31</i></p> <p><i>2/21/31</i></p> <p><i>2/23/31</i></p> <p><i>2/25/31</i></p> <p><i>2/27/31</i></p> <p><i>2/29/31</i></p> <p><i>3/1/31</i></p> <p><i>3/3/31</i></p> <p><i>3/5/31</i></p> 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## COMMISSION'S EXHIBIT NO. 123

TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 8/29/36 TO 12/31/36

	DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
Walter H. Johnson Candy Co.	8/27/36	8/27/36	1 TW 30	2.84
	7/30	8/14	1 TW 30	3.04
	8/21	8/21	1 TW 30	3.44
	9/4	9/4	1 TW 30	3.29
	9/8	9/8	1 TW 30	3.29
	9/14	9/14	1 TW 30	3.29
	9/22	9/22	1 TW 30	3.29
	9/24	9/24	1 TW 30	3.29
	10/2	10/2	1 TW 30	3.29
	12/14	12/14	1 TW 30	3.14
	12/22	12/22	1 TW 30	3.14
	1/5/37	1/5/37	1 TW 30	3.14
	1/15	1/15	1 TW 30	3.14
	1/20	1/20	1 TW 30	3.14
	1/26	1/26	1 TW 30	3.14
	2/3	2/3	1 TW 30	3.14
	2/12	2/12	1 TW 30	3.14
	2/16	2/16	1 TW 30	3.14
	2/23	2/23	1 TW 30	3.14
	3/3	3/3	1 TW 30	3.14
	3/11	3/11	1 TW 30	3.14
	3/15	3/15	1 TW 30	3.14
	3/18	3/18	1 TW 30	3.14
	3/31	3/31	1 TW 30	3.14
	3/25	4/2	1 TW 30	3.14
		4/3	1 TW 30	3.14
		4/7	1 TW 30	3.14
		4/14	1 TW 30	3.14
		4/15	1 TW 30	3.14
		4/19	1 TW 30	3.14
		4/23	1 TW 30	3.14
		4/21	1 TW 30	3.14
		4/26	1 TW 30	3.14
		4/28	1 TW 30	3.14
		5/4	1 TW 30	3.14
		5/6	1 TW 30	3.14
		5/6	1 TW 30	3.14
		5/10	1 TW 30	3.14
		5/12	1 TW 30	3.14
		5/12	1 TW 30	3.14
	6/25	6/25	1 TW 30	3.69
	6/25	6/25	1 TW 30	3.69
	6/29	6/29	1 TW 30	3.69
	6/29	6/29	1 TW 30	3.69
	7/1	7/1	1 TW 30	3.69
	7/1	7/1	1 TW 30	3.69
	7/6	7/6	1 TW 30	3.69
	7/12	7/12	1 TW 30	3.69
	7/15	7/15	1 TW 30	3.69
	7/15	7/15	1 TW 30	3.69
	7/20	7/20	1 TW 30	3.69
	7/21	7/21	1 TW 30	3.69
	7/23	7/23	1 TW 30	3.69
	7/29	7/29	1 TW 30	3.14

FEDERAL TRADE COMMISSION

Dkt. 333

Exhibit 123

In U.S.

Introduced

Date 5/9/40

by C. H. Cull

By Special Agent

F. F. FISHER &amp; ASSOCIATES, INC.

## COMMISSION'S EXHIBIT NO. 124

FORM 500 7-20-20

C. P. &amp; NO.

59286W

## CORN PRODUCTS SALES COMPANY

17 BATTERY PLACE  
NEW YORKE. J. Broch & Sons,  
4654 W. Kinzie St.,  
Chicago, Illinois.Date 6/22/20  
New Business X  
Confirming Wire X  
Trade No. 9  
Customer Order No. 0  
Brokers No. 1441

Dear Sir:

We are in receipt of your order through Corn Products Sales Co., Chicago, Ill. 601 to

10 Tank-Cars Crystal S Star C.S.W. 62-44 Pkt. Ppropd.

Buyer will be charged \$1.00 per day for each days detention of sellers tank car in excess of \_\_\_\_\_  
without cc \_\_\_\_\_  
in day \_\_\_\_\_

any cut, or other tax or charge.  
hereafter  
which each shipment is a condition, shall  
be added to the price herein specified.

that the goods are for consumption in your  
factory only.

which is hereby confirmed upon the following terms and conditions:

Deliveries to be made as ordered subject to Seller's approval of Buyer's credit before each shipment.

SHIPMENT F. O. B. date at point of shipment freight prepaid (in cartons) to be made within 10 days from date of sale, unless otherwise stated above.

SHIPPING INSTRUCTIONS To be furnished by Buyer within 2 days from date of sale and if not so furnished Seller has the option of making shipment within contract period, or to cancel contract without notice.

PAYMENT 75% 10 days in New York or Chicago exchange due at Seller's New York office within 10 days from date of invoice.

If at any time before delivery the financial responsibility of the Buyer becomes impaired or unsatisfactory to the Seller, or Buyer should have failed to make payment for previous shipment in accordance with terms of sale, Seller may cancel any unshipped portion of the contract or require cash payment or satisfactory security before further shipment is made.

DELAYS IN SHIPMENT Seller shall in no case be held responsible for damage or storage charges at destination or for any damage arising from delayed shipments caused by strikes, accidents, or otherwise, including to prevent loading or unloading of manufacture beyond its control; but if shipment is delayed beyond 10 days through Seller's default, Buyer is entitled to any lower market price of Seller in effect on date of shipment or Buyer may cancel delayed order by telegram or letter, provided notice is received by the Seller before shipment of such order, otherwise order remains uncancelled.

ROUTING Seller reserves the right to ship from any factory or point and select the routing. Every effort will be made to report Buyer's wishes as to delivery from where economical routes is given. Buyer assumes risk of damage and delay after delivery to carrier in good condition. Where damage or change is apparent on arrival, Buyer should always receipt for goods to the transportation company in damaged condition and notify Seller immediately.

No sales are binding upon this company until accepted in writing at the principal office of Seller in New York. Salesmen and local brokers are not empowered to execute or modify contracts for Seller.

The prepaid price herein named is subject to change either up or down, according to any advance or decline in the freight rate on any portion not shipped at the time such rate change becomes effective.

Seller not to be responsible for the adaptability of the goods to be delivered on this contract for any specific purpose unless specially and separately provided for in this contract.

It is agreed that the goods sold under this contract are for consumption in the United States only and not for export.

3626  
10-9-42  
Corn Products Sales Company

CORN PRODUCTS SALES COMPANY

Walter Zisch

## COMMISSION'S EXHIBIT NO. 125

## CORN PRODUCTS SALES COMPANY

WESTBELL BUILDING  
17 BATTERY PLACE  
NEW YORK

C. P. S. NO.



Date 7/6/34  
New Business \_\_\_\_\_  
Confirming Wire X  
Trade No. 9  
Customers Order No. \_\_\_\_\_  
Brokers No. 1785

E. J. Brech & Sons,  
4656 W. Kinzie St.,  
Chicago, Illinois.

Dear Sir:

We are in receipt of your order through Corn Products Sales Co., Chicago, Ill. #01 for

**5 Tank Cars Crystal S Star C.S.U. @2.44 Ppd.**

VPF will be charged \$1.00 per day for each day's detention of tank cars. If you are unable to take delivery of the goods within 10 days from date of sale, without consent of seller he will be charged \$1.00 per day for each day's detention.

Any duty, excise or other tax or charge Federal, State, Local, or otherwise imposed on the goods or on the carrier, or its employees, shall be paid by the buyer.

If our regular market price on date of arrival in your market of any shipments under this contract is lower than the price at which such shipments are made, you will receive the benefit of such lower price.

which is hereby confirmed upon the following terms and conditions:

Deliveries to be made as ordered subject to Seller's approval of Buyer's credit before each shipment.

**SHIPMENT** P. O. S. cars at point of shipment freight prepaid (in carlots) to be made within 10 days from date of sale, unless otherwise stated above.

**SHIPPING INSTRUCTIONS** To be furnished by Buyer, unless otherwise stated, and if not so furnished Seller has the option of making shipment within contract period, or to cancel contract without notice.

**PAYMENT** 25 10 days in New York or Chicago exchange due at Seller's New York office within 10 days from date of invoice.

If at any time before delivery the financial responsibility of the Buyer becomes impaired or unsatisfactory to the Seller, or Buyer should have failed to make payment for previous shipment in accordance with terms of sale, Seller may cancel any unshipped portion of the contract or require cash payment or satisfactory security before further shipment is made.

**DELAYS IN SHIPMENT** Seller shall in no case be held responsible for demurrage or storage charges at destination or for any damages arising from delayed shipments caused by strikes, accidents, or shortages, inability to procure supplies or interruptions of manufacture beyond his control; but if shipment is delayed beyond 10 days through Seller's default, Buyer is entitled to any lower market price of Seller in effect on date of shipment or Buyer may cancel delayed order by telegram or letter, provided same is received by the Seller before shipment of such order, otherwise order remains uncancelled.

**ROUTING** Seller reserves the right to ship from any factory or point and select the routing. Every effort will be made to report Buyer's wishes as to delivery time where commercial reason is given. Buyer assumes risk of loss and damage after delivery to carrier in good condition. Where shortage or damage is apparent on arrival, Buyer should always receipt for goods to the transportation company in damaged condition and notify Seller immediately.

No sales are binding upon this company until accepted in writing at the principal office of Seller in New York. Salesmen and local brokers are not empowered to accept or modify contracts for Seller.

The prepaid price herein named is subject to change either up or down, according to any advance or decline in the freight rate on any portion not shipped at the time such rate change becomes effective.

Seller not to be responsible for the adaptability of the goods to be delivered on this contract for any specific purpose unless specially and separately provided for in this contract.

It is agreed that the goods sold under this contract are for consumption in the United States only and not for export.

Respectfully yours,

CORN PRODUCTS SALES COMPANY

Per \_\_\_\_\_

## COMMISSION'S EXHIBIT NO. 126

ALL GOODS DELIVERED TO CHICAGO CONFECTIONERS 6/12/36 TO 12/31/39

Crystal Pure Candy Company

DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
6/3/36	6/3/36	1 T W 2•	\$2.49
6/3	6/3	1 T W 2•	2.49
6/4	6/4	1 T W 2•	2.49
6/4	6/4	1 T W 2•	2.49
6/4	6/5	1 T W 2•	2.49
6/5	6/5	1 T W 2•	2.49
6/1	6/8	1 T W 2•	2.49
	6/8	1 T W 2•	2.49
	6/9	1 T W 2•	2.49
	6/10	1 T W 2•	2.49
6/10	6/10	1 T W 2•	2.49
6/11	6/11	1 T W 2•	2.49
6/11	6/11	1 T W 2•	2.49
6/1	6/12	1 T W 2•	2.49
	6/12	1 T W 2•	2.49
	6/15	1 T W 2•	2.49
	6/15	1 T W 2•	2.49
	6/16	1 T W 2•	2.49
6/16	6/17	1 T W 2•	2.49
6/17	6/17	1 T W 2•	2.49
6/18	6/18	1 T W 2•	2.49
6/18	6/18	1 T W 2•	2.49
6/19	6/19	1 T W 2•	2.49
6/19	6/19	1 T W 2•	2.49
6/22	6/22	1 T W 2•	2.49
6/22	6/22	1 T W 2•	2.49
6/23	6/23	1 T W 2•	2.49
	6/24	1 T W 2•	2.49
	6/25	1 T W 2•	2.49
	6/26	1 T W 2•	2.49
	6/26	1 T W 2•	2.49
	6/29	1 T W 2•	2.49
	6/29	1 T W 2•	2.49
	6/30	1 T W 2•	2.49
	6/30	1 T W 2•	2.49
	7/1	1 T W 2•	2.49
	7/1	1 T W 2•	2.49
6/23	7/2	1 T W 2•	2.49
	7/2	1 T W 2•	2.49
	7/3	1 T W 2•	2.49
7/6	7/6	1 T W 2•	2.49
	7/6	1 T W 2•	2.49
	7/7	1 T W 2•	2.49
	7/9	1 T W 2•	2.49
	7/9	1 T W 2•	2.49
	7/11	1 T W 2•	2.49
	7/13	1 T W 2•	2.49
	7/14	1 T W 2•	2.49
	7/15	1 T W 2•	2.49
	7/15	1 T W 2•	2.49

FEDERAL TRADE COMMISSION

No. 3635

IN RE: *Corn Swavels*DATE: *6/20* FILE NO. *1260*RECEIVED *Stapley*  
KIDDE, K. FISHER & ASSOCIATES, INC.

P

**THIS TRADE AGREEMENT IS SUBJECT TO THE COMMISSION'S ORDER OF 12/22/39**

Ortal Pure Candy Company

<u>DATE OF ORDER</u>	<u>DELIVERY DATE</u>	<u>QUANTITY</u>	<u>PRICE</u>
	7/12/39	1 T W 20	\$2.40
	7/13	1 T W 20	2.40
	7/17	1 T W 20	2.40
	7/17	1 T W 20	2.40
	7/18	1 T W 20	2.40
	7/21	1 T W 20	2.40
	7/22	1 T W 20	2.40
	7/22	1 T W 20	2.40
	7/23	1 T W 20	2.40
	7/23	1 T W 20	2.40
	7/23	1 T W 20	2.40
	7/24	1 T W 20	2.40
	7/24	1 T W 20	2.40
	7/25	1 T W 20	2.40
	7/27	1 T W 20	2.40
	7/27	1 T W 20	2.40
7/28	7/28	1 T W 20	2.84
	7/28	1 T W 20	2.84
7/29	7/29	1 T W 20	2.84
	7/29	1 T W 20	2.84
7/30	7/30	1 T W 20	2.84
	7/30	1 T W 20	2.84
7/31	7/31	1 T W 20	2.99
7/8	7/30	1 T W 20	2.40
	7/30	1 T W 20	2.40
7/8	7/21	1 T W 20	2.40
8/1	8/1	1 T W 20	2.99
	8/1	1 T W 20	2.99
8/3	8/3	1 T W 20	2.99
	8/3	1 T W 20	2.99
	8/3	1 T W 20	2.99
	8/5	1 T W 20	2.99
	8/5	1 T W 20	2.99
	8/6	1 T W 20	2.99
	8/7	1 T W 20	2.99
	8/7	1 T W 20	2.99
	8/8	1 T W 20	2.99
	8/8	1 T W 20	2.99
	8/10	1 T W 20	2.99
	8/10	1 T W 20	2.99
	8/11	1 T W 20	2.99
	8/11	1 T W 20	2.99
	8/12	1 T W 20	2.99
	8/12	1 T W 20	2.99
	8/13	1 T W 20	2.99
	8/13	1 T W 20	2.99
	8/15	1 T W 20	2.99
	8/15	1 T W 20	2.99
	8/4	1 T W 20	2.99
8/17	8/17	1 T W 20	3.19
8/18	8/18	1 T W 20	3.19
	8/18	1 T W 20	3.19

FEDERAL TRADE COMMISSION  
 Order No. 33-15000-126-3  
 IN THE MATTER OF Cornell Food  
 DOE (C. 9/4) Wm. C. C. C.  
 REPORTER Shelley  
 STEEL E. FISHER & ASSOCIATES, INC.



TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 8/19/36 TO 12/31/36

Crystalline Candy Company

DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
8/19/36	8/19/36	1 TW 20	\$3.39
8/20	8/20	1 TW 20	3.39
8/21	8/21	1 TW 20	3.39
8/21	8/21	1 TW 20	3.39
8/22	8/22	1 TW 20	3.39
8/24	8/24	1 TW 20	3.39
8/25	8/25	1 TW 20	3.24
8/25	8/25	1 TW 20	3.24
8/25	8/25	1 TW 20	3.24
8/27	8/27	1 TW 20	3.24
8/27	8/27	1 TW 20	3.24
8/28	8/28	1 TW 20	3.24
8/29	8/29	1 TW 20	3.24
8/29	8/29	1 TW 20	3.24
8/31	8/31	1 TW 20	3.24
8/31	8/31	1 TW 20	3.24
9/1	9/1	1 TW 20	3.24
9/2	9/2	1 TW 20	3.24
9/2	9/2	1 TW 20	3.24
9/3	9/3	1 TW 20	3.24
9/3	9/3	1 TW 20	3.24
9/4	9/4	1 TW 20	3.24
9/4	9/4	1 TW 20	3.24
9/5	9/5	1 TW 20	3.24
9/6	9/6	1 TW 20	3.24
9/6	9/6	1 TW 20	3.24
9/9	9/9	1 TW 20	3.24
9/9	9/9	1 TW 20	3.24
9/10	9/10	1 TW 20	3.24
9/10	9/10	1 TW 20	3.24
9/11	9/11	1 TW 20	3.24
9/11	9/11	1 TW 20	3.24
9/12	9/12	1 TW 20	3.24
9/13	9/13	1 TW 20	3.24
9/13	9/13	1 TW 20	3.24
9/16	9/16	1 TW 20	3.24
9/16	9/16	1 TW 20	3.24
9/17	9/17	1 TW 20	3.24
9/17	9/17	1 TW 20	3.24
9/18	9/18	1 TW 20	3.24
9/18	9/18	1 TW 20	3.24
9/19	9/19	1 TW 20	3.24
9/21	9/21	1 TW 20	3.24
9/21	9/21	1 TW 20	3.24
9/22	9/22	1 TW 20	3.24
9/22	9/22	1 TW 20	3.24
9/23	9/23	1 TW 20	3.24
9/23	9/23	1 TW 20	3.24

FEDERAL TRADE COMMISSION  
 Serial No. 3672  
 IN THE MATTER OF Candy Company  
 DATE 9/2 1936  
 REPORTER W. H. Cull  
 WITNESSES W. H. Cull  
 SIGNATURE

TANK WAGON DELIVERIES TO CHICAGO CEMENT WORKS 8/19/36 TO 12/31/39

	<u>DATE OF ORDER</u>	<u>DELIVERY DATE</u>	<u>QUANTITY</u>	<u>PRICE</u>
Crystal Pure Candy Company	9/24/36	9/24/36	1 T W 3•	33.29
		9/24	1 T W 2•	3.24
	9/25	9/25	1 T W 2•	3.24
		9/25	1 T W 2•	3.24
	9/26	9/26	1 T W 2•	3.24
	9/28	9/28	1 T W 2•	3.24
		9/28	1 T W 2•	3.24
	9/29	9/29	1 T W 2•	3.24
		9/29	1 T W 2•	3.24
	9/30	9/30	1 T W 2•	3.24
		9/30	1 T W 2•	3.24
	10/1	10/1	1 T W 2•	3.24
		10/1	1 T W 2•	3.24
	10/2	10/2	1 T W 2•	3.24
		10/2	1 T W 2•	3.24
	10/3	10/3	1 T W 2•	3.24
	10/5	10/5	1 T W 2•	3.09
		10/5	1 T W 2•	3.09
	10/6	10/6	1 T W 2•	3.09
		10/6	1 T W 2•	3.09
	10/7	10/7	1 T W 2•	3.09
		10/7	1 T W 2•	3.09
	10/8	10/8	1 T W 2•	3.09
		10/8	1 T W 2•	3.09
	10/9	10/9	1 T W 3•	3.14
		10/9	1 T W 2•	3.09
	10/12	10/12	1 T W 2•	3.09
	10/10	10/10	1 T W 2•	3.09
	10/12	10/12	1 T W 2•	3.09
	10/13	10/13	1 T W 2•	3.09
		10/13	1 T W 2•	3.09
	10/14	10/14	1 T W 2•	3.09
		10/14	1 T W 2•	3.09
	10/16	10/16	1 T W 2•	3.09
		10/16	1 T W 2•	3.09
	10/16	10/16	1 T W 2•	3.09
		10/16	1 T W 2•	3.09
	10/17	10/17	1 T W 2•	3.09
	10/19	10/19	1 T W 2•	3.09
		10/19	1 T W 2•	3.09
	10/20	10/20	1 T W 2•	3.09
		10/20	1 T W 2•	3.09
	10/21	10/21	1 T W 2•	3.09
		10/21	1 T W 2•	3.09
	10/22	10/22	1 T W 2•	3.09
		10/22	1 T W 2•	3.09
	10/26	10/26	1 T W 2•	3.09
		10/26	1 T W 2•	3.09
	10/27	10/27	1 T W 2•	3.09
		10/27	1 T W 2•	3.09
	10/28	10/28	1 T W 2•	3.09

FEDERAL TRADE COMMISSION

Field No. 7433 Sub No. 1262

IN THE MATTER OF Crystal Pure Candy CompanyNITEL, et al. vs. WITNESS CrystalREPORTER Crystal

FISHER

DATE WHEN DELIVERED TO CHICAGO CONFECTIONERS 9/19/36 TO 12/31/39

Crystal Pure Candy Company

DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
	10/28/36	1 T W 2-	\$5.00
10/29/36	10/29	1 T W 2-	3.00
	10/29	1 T W 2-	3.00
10/30	10/30	1 T W 2-	3.00
	10/30	1 T W 2-	3.00
10/31	10/31	1 T W 2-	3.00
	10/31	1 T W 2-	3.00
11/3	11/3	1 T W 2-	3.00
	11/3	1 T W 2-	3.00
11/4	11/4	1 T W 2-	3.00
	11/4	1 T W 2-	3.00
11/5	11/5	1 T W 2-	3.00
	11/5	1 T W 2-	3.00
11/6	11/6	1 T W 2-	3.00
	11/6	1 T W 2-	3.00
11/7	11/7	1 T W 2-	3.00
	11/7	1 T W 2-	3.00
11/9	11/9	1 T W 2-	3.00
	11/9	1 T W 2-	3.00
11/10	11/10	1 T W 2-	3.00
	11/10	1 T W 2-	3.00
11/11	11/11	1 T W 2-	3.00
	11/11	1 T W 2-	3.00
11/12	11/12	1 T W 2-	3.00
	11/12	1 T W 2-	3.00
11/13	11/13	1 T W 2-	3.00
	11/13	1 T W 2-	3.00
11/14	11/14	1 T W 2-	3.00
	11/14	1 T W 2-	3.00
11/16	11/16	1 T W 2-	3.00
	11/16	1 T W 2-	3.00
	11/17	1 T W 2-	3.00
	11/17	1 T W 2-	3.00
	11/18	1 T W 2-	3.00
	11/18	1 T W 2-	3.00
	11/19	1 T W 2-	3.00
	11/19	1 T W 2-	3.00
	11/20	1 T W 2-	3.00
	11/20	1 T W 2-	3.00
	11/21	1 T W 2-	3.00
	11/21	1 T W 2-	3.00
	11/21	1 T W 2-	3.00
	11/23	1 T W 2-	3.00
	11/24	1 T W 2-	3.00
	11/24	1 T W 2-	3.00
	11/25	1 T W 2-	3.00
	11/26	1 T W 2-	3.00
	11/27	1 T W 2-	3.00
	11/27	1 T W 2-	3.00
	11/28	1 T W 2-	3.00
	11/28	1 T W 2-	3.00
	11/30	1 T W 2-	3.00
	11/30	1 T W 2-	3.00

FEDERAL TRADE COMMISSION  
 Serial No. 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100  
 IN THE MATTER OF Crystal Pure Candy Company  
 DATED 1/9, 1940 BETWEEN Crystal Pure Candy Company  
 REPORTER Bluskey  
 FISHER

SALE ORDER DELIVERED TO CHICAGO CONFECTIONERS 9/19/36 TO 12/31/36

C. stal Pure Candy Company

DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
	12/1/36	1 T W 20	\$5.09
	12/1	1 T W 20	3.09
	12/2	1 T W 20	3.09
	12/2	1 T W 20	3.09
	12/3	1 T W 20	3.09
	12/3	1 T W 20	3.09
12/3	12/4	1 T W 20	3.09
	12/4	1 T W 20	3.09
	12/4	1 T W 20	3.09
	12/5	1 T W 20	3.09
	12/5	1 T W 20	3.09
	12/7	1 T W 20	3.09
	12/7	1 T W 30	3.14
12/8	12/7	1 T W 20	3.09
	12/8	1 T W 20	3.09
	12/8	1 T W 20	3.09
	12/9	1 T W 20	3.09
	12/9	1 T W 20	3.09
	12/9	1 T W 20	3.09
	12/10	1 T W 20	3.09
	12/10	1 T W 20	3.09
	12/11	1 T W 20	3.09
	12/11	1 T W 20	3.09
	12/12	1 T W 20	3.09
	12/12	1 T W 20	3.09
	12/14	1 T W 20	3.09
	12/14	1 T W 20	3.09
	12/15	1 T W 20	3.09
	12/15	1 T W 20	3.09
	12/16	1 T W 20	3.09
	12/17	1 T W 20	3.09
	12/18	1 T W 20	3.09
	12/18	1 T W 20	3.09
	12/19	1 T W 20	3.09
	12/21	1 T W 20	3.09
	12/21	1 T W 20	3.09
	12/22	1 T W 20	3.09
	12/23	1 T W 20	3.09

FEDERAL TRADE COMMISSION

Revised No. 36 12 1936

IN THE MATTER OF

DATE: \_\_\_\_\_ WHERE: \_\_\_\_\_

REPORTED BY: \_\_\_\_\_

FILED

12/22/36	1/11/37	1 T W 20	\$3.09
	1/12	1 T W 20	3.09
	1/12	1 T W 20	3.09
	1/13	1 T W 20	3.09
12/22/36	1/14	1 T W 20	3.09
	1/15	1 T W 20	3.09
	1/15	1 T W 30	3.14
	1/18	1 T W 20	3.09
1/19/37	1/19	1 T W 20	3.09
	1/19	1 T W 20	3.09





TANK WAGON DELIVERIES TO CHICAGO CONTRACTORS 8/18/34 TO 12/31/39

[illegible]

THESE RECORDS RELATIVES TO CHICAGO COMMISSIONERS 8/12/31 TO 12/31/31

Central Pure Candy Company

DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
8/10/31	8/10/31	1 T W 2-	\$3.09
8/14	8/14	1 T W 2-	3.09
8/16	8/16	1 T W 2-	3.09
8/11	8/11	1 T W 2-	3.09
8/12	8/12	1 T W 2-	3.09
8/13	8/13	1 T W 2-	3.09
8/17	8/17	1 T W 2-	3.09
8/18	8/18	1 T W 2-	3.09
8/19	8/19	1 T W 2-	3.09
8/23	8/23	1 T W 2-	3.09
8/24	8/24	1 T W 2-	3.09
8/25	8/25	1 T W 2-	3.09
8/26	8/26	1 T W 2-	3.09
8/27	8/27	1 T W 2-	3.09
8/30	8/30	1 T W 2-	3.09
8/31	8/31	1 T W 2-	3.09
9/2	9/2	1 T W 2-	3.09
9/3	9/3	1 T W 2-	3.09
9/7	9/7	1 T W 2-	3.09
9/8	9/8	1 T W 2-	3.09
9/9	9/9	1 T W 2-	3.09
9/10	9/10	1 T W 2-	3.09
9/11	9/11	1 T W 2-	3.09
9/13	9/13	1 T W 2-	3.09
9/14	9/14	1 T W 2-	3.09
9/15	9/15	1 T W 2-	3.09
9/16	9/16	1 T W 2-	3.09
9/17	9/17	1 T W 2-	3.09
9/20	9/20	1 T W 2-	3.09
9/21	9/21	1 T W 2-	3.09
9/22	9/22	1 T W 2-	3.09
9/23	9/23	1 T W 2-	3.09
9/23	9/23	1 T W 2-	3.09
9/24	9/24	1 T W 2-	3.09
9/25	9/25	1 T W 2-	3.09
9/27	9/27	1 T W 2-	3.09
9/28	9/28	1 T W 2-	3.09
9/29	9/29	1 T W 2-	3.09
9/30	9/30	1 T W 2-	3.09
10/1	10/1	1 T W 2-	3.09
10/2	10/2	1 T W 2-	3.09
10/4	10/4	1 T W 2-	3.09
10/6	10/6	1 T W 2-	3.09
10/7	10/7	1 T W 2-	3.09
10/8	10/8	1 T W 2-	3.09
10/9	10/9	1 T W 2-	3.09
10/11	10/11	1 T W 2-	3.09
10/12	10/12	1 T W 2-	3.09
10/14	10/14	1 T W 2-	3.09
10/15	10/15	1 T W 2-	3.09

FEDERAL TRADE COMMISSION

Order No. 3633 RECEIVED: and No. 1264

IN THE MATTER OF Central Pure Candy Company

DATE \_\_\_\_\_ WHERE \_\_\_\_\_

REPORTER \_\_\_\_\_

PLACES \_\_\_\_\_

TAX WAGON DELIVERIES TO CHICAGO CONFECTIONERS 6/19/36 TO 12/31/39

Crestal Pure Candy Company

<u>DATE OF ORDER</u>	<u>DELIVERY DATE</u>	<u>QUANTITY</u>	<u>PRICE</u>
10/15/37	10/15/37	1 T W 2-	3.09
10/16	10/16	1 T W 2-	3.09
10/22	10/22	1 T W 2-	2.94
10/25	10/25	1 T W 2-	2.79
10/26	10/26	1 T W 2-	2.79
10/27	10/27	1 T W 2-	2.79
10/27	10/27	1 T W 2-	2.79
10/28	10/28	1 T W 2-	2.79
10/29	10/29	1 T W 2-	2.79
	10/29	1 T W 2-	2.79
10/30	10/30	1 T W 2-	2.79
11/1	11/1	1 T W 2-	2.64
	11/1	1 T W 2-	2.64
11/2	11/2	1 T W 2-	2.64
11/3	11/3	1 T W 2-	2.64
	11/3	1 T W 2-	2.64
11/4	11/4	1 T W 2-	2.64
11/5	11/5	1 T W 2-	2.64
	11/5	1 T W 2-	2.64
11/6	11/6	1 T W 2-	2.64
	11/6	1 T W 2-	2.64
11/7	11/7	1 T W 2-	2.64
11/8	11/8	1 T W 2-	2.64
11/9	11/9	1 T W 2-	2.64
	11/9	1 T W 2-	2.64
11/10	11/10	1 T W 2-	2.64
11/11	11/11	1 T W 2-	2.64
	11/11	1 T W 2-	2.64
11/12	11/12	1 T W 2-	2.64
11/13	11/13	1 T W 2-	2.64
	11/13	1 T W 2-	2.64
11/14	11/14	1 T W 2-	2.64
11/15	11/15	1 T W 2-	2.64
	11/15	1 T W 2-	2.64
11/16	11/16	1 T W 2-	2.64
	11/16	1 T W 2-	2.64
11/17	11/17	1 T W 2-	2.64
11/18	11/18	1 T W 2-	2.64
	11/18	1 T W 2-	2.64
11/19	11/19	1 T W 2-	2.64
	11/19	1 T W 2-	2.64
11/20	11/20	1 T W 2-	2.64
11/21	11/21	1 T W 2-	2.64
	11/21	1 T W 2-	2.64
11/22	11/22	1 T W 2-	2.64
11/23	11/23	1 T W 2-	2.64
	11/23	1 T W 2-	2.64
11/24	11/24	1 T W 2-	2.64
11/27	11/27	1 T W 2-	2.64
11/30	11/30	1 T W 2-	2.64
	11/30	1 T W 2-	2.64
12/1	12/1	1 T W 2-	2.34
12/2	12/2	1 T W 2-	2.34
12/3	12/3	1 T W 2-	2.34
12/4	12/4	1 T W 2-	2.34
12/5	12/5	1 T W 2-	2.34
12/7	12/7	1 T W 2-	2.34
12/8	12/8	1 T W 2-	2.34
12/9	12/9	1 T W 2-	2.34
12/10	12/10	1 T W 2-	2.34

FEDERAL TRADE COMMISSION

Section No. 367.2, 12-20-39, 12-24-39

IN THE MATTER OF Crestal Pure Candy Co.DATE 11/20 WITNESSREPORTER                     

PIKES

TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 6/19/36 TO 12/31/39

	DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
Crystal Pure Candy Company,	12/11/37	12/11/37	1 T W 2-	2.34
	12/13	12/13	1 T W 2-	2.34
	12/14	12/14	1 T W 2-	2.34
	12/15	12/15	1 T W 2-	2.34
	12/16	12/16	1 T W 2-	2.34
	12/20	12/20	1 T W 2-	2.34
	12/21	12/21	1 T W 2-	2.34
	12/22	12/22	1 T W 2-	2.34
	1/5/38	1/5/38	1 T W 2-	2.34
	1/6	1/6	1 T W 2-	2.34
	1/11	1 T W 2-	2.34	
	1/12	1 T W 2-	2.34	
	1/13	1 T W 2-	2.34	
	1/14	1 T W 2-	2.34	
	1/17	1 T W 2-	2.34	
	1/19	1 T W 2-	2.34	
	1/20	1 T W 2-	2.34	
	1/21	1 T W 2-	2.34	
	1/22	1 T W 2-	2.34	
	1/24	1 T W 2-	2.34	
	1/26	1 T W 2-	2.34	
	1/27	1 T W 2-	2.34	
	1/28	1 T W 2-	2.34	
	1/29	1 T W 2-	2.34	
	1/31	1/31	1 T W 2-	2.34
	2/1	2/1	1 T W 2-	2.34
	2/3	2/3	1 T W 2-	2.34
	2/4	2/4	1 T W 2-	2.34
	2/7	2/7	1 T W 2-	2.34
	2/8	2/8	1 T W 2-	2.34
	2/9	2/9	1 T W 2-	2.34
	2/10	2/10	1 T W 2-	2.34
	2/16	2/16	1 T W 2-	2.29
	2/18	2/18	1 T W 2-	2.29
	2/16	2/16	1 T W 2-	2.29
	2/17	2/17	1 T W 2-	2.29
	2/19	2/19	1 T W 2-	2.29
	2/21	2/21	1 T W 2-	2.29
	2/24	2/24	1 T W 2-	2.29
	2/25	2/25	1 T W 2-	2.29
	2/26	2/26	1 T W 2-	2.29
	2/28	2/28	1 T W 2-	2.29
	3/2	3/2	1 T W 2-	2.29
	3/3	3/3	1 T W 2-	2.29
	3/4	3/4	1 T W 2-	2.29
	3/5	3/5	1 T W 2-	2.29
	3/6	3/6	1 T W 2-	2.29

FEDERAL TRADE COMMISSION  
 Serial No. 3633 CONFECTIONERS' UNIT No. 1264  
 IN THE MATTER OF Crown Candy  
 DATE \_\_\_\_\_ WITNESS \_\_\_\_\_  
 REPORTER \_\_\_\_\_ FIRMER \_\_\_\_\_

## TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 6/18/36 TO 12/31/39

Crystal Pure Candy Co.  
(continued from page 11)

DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
3/3/38	3/3/38	1 T W 2*	2.29
3/10	3/10	1 T W 2*	2.29
3/14	3/14	1 T W 2*	2.29
3/15	3/15	1 T W 2*	2.29
3/16	3/16	1 T W 2*	2.29
3/17	3/17	1 T W 2*	2.29
3/19	3/19	1 T W 2*	2.29
3/22	3/22	1 T W 2*	2.29
3/23	3/23	1 T W 2*	2.29
3/24	3/24	1 T W 2*	2.29
3/25	3/25	1 T W 2*	2.29
3/26	3/26	1 T W 2*	2.29
	3/30	1 T W 2*	2.29
	3/31	1 T W 2*	2.29
	4/1	1 T W 2*	2.29
	4/4	1 T W 2*	2.29
	4/5	1 T W 2*	2.29
	4/6	1 T W 2*	2.29
	4/7	1 T W 2*	2.29
	4/11	1 T W 2*	2.29
	4/12	1 T W 2*	2.29
	4/14	1 T W 2*	2.29
	4/15	1 T W 2*	2.29
	4/16	1 T W 2*	2.29
	4/17	1 T W 2*	2.29
	4/20	1 T W 2*	2.29
	4/21	1 T W 2*	2.29
	4/22	1 T W 2*	2.29
	4/23	1 T W 2*	2.29
	4/24	1 T W 2*	2.29
	4/25	1 T W 2*	2.29
	4/26	1 T W 2*	2.29
	4/27	1 T W 2*	2.29
	4/28	1 T W 2*	2.29
	4/29	1 T W 2*	2.29
	5/2	1 T W 2*	2.29
	5/3	1 T W 2*	2.29
	5/4	1 T W 2*	2.34
	5/5	1 T W 2*	2.34
	5/10	1 T W 2*	2.34
	5/11	1 T W 2*	2.34
	5/12	1 T W 2*	2.34
	5/13	1 T W 2*	2.34
	5/13	1 T W 2*	2.34
	5/14	1 T W 2*	2.34
	5/16	1 T W 2*	2.34
	5/17	1 T W 2*	2.34
	5/18	1 T W 2*	2.34
	5/20	1 T W 2*	2.34
	5/21	1 T W 2*	2.34
	5/23	1 T W 2*	2.34
	5/24	1 T W 2*	2.34
	5/25	1 T W 2*	2.34
	5/26	1 T W 2*	2.34
	5/27	1 T W 2*	2.34

FEDERAL TRADE COMMISSION

Docket No. 36,333

IN THE MATTER OF *Corn Prod.*

DATE

WITNESS

REPORTER

FISHING



TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 6/19/38 TO 12/31/39

	DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
Crystal Pure Candy Co. (continued from page 12)	6/31/38	5/31/38	1 TW 2•	2.34
	6/2	5/31	1 TW 3•	2.39
	6/3	6/2	1 TW 3•	2.39
		6/3	1 TW 2•	2.36
	6/4	6/3	1 TW 2•	2.74
	6/6	6/4	1 TW 2•	2.36
	6/7	6/6	1 TW 2•	2.36
	6/8	6/7	1 TW 2•	2.74
	6/9	6/8	1 TW 2•	2.34
		6/9	1 TW 2•	2.34
	6/11	6/9	1 TW 2•	2.74
	6/12	6/11	1 TW 2•	2.34
		6/12	1 TW 2•	2.34
	6/14	6/13	1 TW 2•	2.34
	6/15	6/14	1 TW 2•	2.36
	6/16	6/15	1 TW 2•	2.34
		6/16	1 TW 2•	2.34
	6/17	6/16	1 TW 2•	2.34
	6/18	6/17	1 TW 2•	2.34
	6/20	6/18	1 TW 2•	2.34
	6/21	6/20	1 TW 2•	2.34
	6/22	6/21	1 TW 2•	2.34
		6/22	1 TW 2•	2.34
	6/24	6/22	1 TW 2•	2.34
	6/27	6/25	1 TW 2•	2.34
	6/28	6/27	1 TW 2•	2.34
	6/29	6/28	1 TW 2•	2.34
		6/29	1 TW 2•	2.34
	6/30	6/29	1 TW 2•	2.34
	7/1	6/30	1 TW 2•	2.34
	7/5	7/1	1 TW 2•	2.34
	7/6	7/5	1 TW 2•	2.34
	7/7	7/6	1 TW 2•	2.34
		7/7	1 TW 2•	2.34
	7/8	7/7	1 TW 2•	2.34
	7/9	7/8	1 TW 2•	2.34
	7/11	7/9	1 TW 2•	2.34
	7/12	7/11	1 TW 2•	2.34
	7/13	7/12	1 TW 2•	2.34
		7/13	1 TW 2•	2.34
		7/14	1 TW 2•	2.34
		7/15	1 TW 2•	2.34
		7/16	1 TW 2•	2.34
		7/17	1 TW 2•	2.34
	7/18	7/16	1 TW 2•	2.34
	7/19	7/18	1 TW 2•	2.34
		7/19	1 TW 2•	2.34
	7/20	7/19	1 TW 2•	2.34
	7/21	7/20	1 TW 2•	2.34
		7/21	1 TW 2•	2.34
		7/21	1 TW 2•	2.34

TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 6/19/36 TO 12/31/39

Crystal Pure Candy Co.  
continued from page 13

DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
7/22/38	7/22/38	1 T W 2*	2.34
7/23	7/23	1 T W 2*	2.34
7/25	7/25	1 T W 2*	2.34
7/26	7/26	1 T W 2*	2.34
7/27	7/27	1 T W 2*	2.34
	7/27	1 T W 2*	2.34
7/28	7/28	1 T W 2*	2.34
7/29	7/29	1 T W 2*	2.34
8/1	8/1	1 T W 2*	2.34
	8/1	1 T W 2*	2.34
8/2	8/2	1 T W 2*	2.29
8/3	8/3	1 T W 2*	2.29
8/4	8/4	1 T W 2*	2.29
8/5	8/5	1 T W 2*	2.29
	8/5	1 T W 2*	2.29
8/6	8/6	1 T W 2*	2.19
8/9	8/9	1 T W 2*	2.19
8/10	8/10	1 T W 2*	2.19
8/11	8/11	1 T W 2*	2.19
8/12	8/12	1 T W 2*	2.19
	8/12	1 T W 2*	2.19
8/13	8/13	1 T W 2*	2.19
8/16	8/16	1 T W 2*	2.19
8/17	8/17	1 T W 2*	2.19
8/18	8/18	1 T W 2*	2.19
8/19	8/19	1 T W 2*	2.19
8/20	8/20	1 T W 2*	2.19
8/22	8/22	1 T W 2*	2.19
	8/22	1 T W 2*	2.19
8/23	8/23	1 T W 2*	2.19
8/24	8/24	1 T W 2*	2.19
	8/24	1 T W 2*	2.19
8/25	8/25	1 T W 2*	2.19
8/26	8/26	1 T W 2*	2.19
	8/26	1 T W 2*	2.19
8/27	8/27	1 T W 2*	2.19
8/29	8/29	1 T W 2*	2.19
8/30	8/30	1 T W 2*	2.19
	8/30	1 T W 2*	2.19
8/31	8/31	1 T W 2*	2.19
9/1	9/1	1 T W 2*	2.19
9/2	9/2	1 T W 2*	2.19
	9/2	1 T W 2*	2.19
	9/2	1 T W 2*	2.19
9/6	9/6	1 T W 2*	2.19
	9/6	1 T W 2*	2.19
9/7	9/7	1 T W 2*	2.19
	9/7	1 T W 2*	2.19
9/8	9/8	1 T W 2*	2.19
9/9	9/9	1 T W 2*	2.19
	9/9	1 T W 2*	2.19
9/10	9/10	1 T W 2*	2.19
9/12	9/12	1 T W 2*	2.19

FEDERAL TRADE COMMISSION

Label No. 3633

IN THE MATTER OF *Confectioners*

WITNESS

RECORDED

INDEXED

TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 6/19/36 TO 12/31/39

Crystal Pure Candy Co.  
(continued from page 14)

DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
9/13/36	9/13/36	1 T W 20	2.19
	9/13	1 T W 20	2.19
9/14	9/14	1 T W 20	2.19
9/15	9/15	1 T W 20	2.19
	9/15	1 T W 20	2.19
9/16	9/16	1 T W 20	2.19
	9/16	1 T W 20	2.19
9/17	9/17	1 T W 20	2.19
9/19	9/19	1 T W 20	2.19
	9/19	1 T W 20	2.19
	9/20	1 T W 20	2.19
	9/21	1 T W 20	2.19
	9/21	1 T W 20	2.19
	9/22	1 T W 20	2.19
	9/22	1 T W 20	2.19
	9/23	1 T W 20	2.19
	9/23	1 T W 20	2.19
	9/24	1 T W 20	2.19
	9/26	1 T W 20	2.19
	9/27	1 T W 20	2.19
	9/27	1 T W 20	2.19
	9/28	1 T W 20	2.19
	9/29	1 T W 20	2.19
	9/29	1 T W 20	2.19
	9/30	1 T W 20	2.19
	9/30	1 T W 20	2.19
	10/1	1 T W 20	2.19
10/3	10/3	1 T W 20	2.19
10/3	10/3	1 T W 20	2.19
10/4	10/4	1 T W 20	2.19
	10/4	1 T W 20	2.19
10/5	10/5	1 T W 20	2.19
10/6	10/6	1 T W 20	2.14
	10/6	1 T W 20	2.14
10/7	10/7	1 T W 20	2.14
10/8	10/8	1 T W 20	2.14
10/11	10/11	1 T W 20	2.14
	10/11	1 T W 20	2.14
10/12	10/12	1 T W 20	2.14
	10/12	1 T W 20	2.14
10/13	10/13	1 T W 20	2.14
	10/13	1 T W 20	2.14
10/14	10/14	1 T W 20	2.14
10/15	10/15	1 T W 20	2.14
10/17	10/17	1 T W 20	2.14
	10/17	1 T W 20	2.14
10/18	10/18	1 T W 20	2.14
	10/18	1 T W 20	2.14
10/19	10/19	1 T W 20	2.14
10/20	10/20	1 T W 20	2.14
10/27	10/27	1 T W 20	2.14
	10/27	1 T W 20	2.14
10/28	10/28	1 T W 20	2.14
	10/28	1 T W 20	2.14

PREPARED BY THE CHICAGO COMMISSION

Under No. 34-21

IN THE MATTER OF

DATE

RECORDED

FILED

TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 6/19/36 TO 12/31/39

	DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
Crystal Pure Candy Co. (Continued from page 15)	10/29/38	10/29/38	1 TW 2-	2.14
	10/31	10/31	1 TW 2-	2.14
		10/31	1 TW 2-	2.14
	11/1	11/1	1 TW 2-	2.14
		11/1	1 TW 2-	2.14
		11/1	1 TW 2-	2.14
	11/2	11/2	1 TW 2-	2.14
		11/2	1 TW 2-	2.14
		11/2	1 TW 2-	2.14
	11/3	11/3	1 TW 2-	2.14
		11/3	1 TW 2-	2.14
		11/3	1 TW 2-	2.14
	11/4	11/4	1 TW 2-	2.14
		11/4	1 TW 2-	2.14
	11/5	11/5	1 TW 2-	2.14
	11/7	11/7	1 TW 2-	2.14
		11/7	1 TW 2-	2.14
	11/8	11/8	1 TW 2-	2.14
		11/8	1 TW 2-	2.14
		11/8	1 TW 2-	2.14
	11/9	11/9	1 TW 2-	2.14
		11/9	1 TW 2-	2.14
		11/9	1 TW 2-	2.14
	11/10	11/10	1 TW 2-	2.14
		11/10	1 TW 2-	2.14
		11/10	1 TW 2-	2.14
	11/11	11/11	1 TW 2-	2.14
		11/11	1 TW 2-	2.14
	11/14	11/14	1 TW 2-	2.14
		11/14	1 TW 2-	2.14
		11/14	1 TW 2-	2.14
		11/15	1 TW 2-	2.14
		11/15	1 TW 2-	2.14
		11/15	1 TW 2-	2.14
		11/16	1 TW 2-	2.14
		11/16	1 TW 2-	2.14
		11/17	1 TW 2-	2.14
		11/17	1 TW 2-	2.14
		11/17	1 TW 2-	2.14
		11/18	1 TW 2-	2.14
		11/18	1 TW 2-	2.14
		11/19	1 TW 2-	2.14
		11/21	1 TW 2-	2.14
		11/21	1 TW 2-	2.14
		11/22	1 TW 2-	2.14
		11/22	1 TW 2-	2.14
		11/22	1 TW 2-	2.14
		11/23	1 TW 2-	2.14
		11/23	1 TW 2-	2.14
		11/23	1 TW 2-	2.14
		11/25	1 TW 2-	2.14
		11/25	1 TW 2-	2.14
		11/25	1 TW 2-	2.14
		11/26	1 TW 2-	2.14
		11/26	1 TW 2-	2.14

FEDERAL TRADE COMMISSION

Docket No. 34,332 - CONFECTIONERS' EXHIBIT No. 126

IN THE MATTER OF Crystal Pure Candy Co.

DATE: 11-1-39

REPORTED BY: FISHER





TANK WAGON DELIVERIES TO CHICAGO SUPERMARTS 1/10/30 TO 3/31/30

Crystal Pure Candy Co.  
(continued from page 17)

DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
11/14/29	11/14/29	1 T W 20	2.14
	11/15	1 T W 20	2.14
	11/17	1 T W 20	2.14
	11/18	1 T W 20	2.14
	11/19	1 T W 20	2.14
	11/20	1 T W 20	2.14
	11/21	1 T W 20	2.14
12/12/29	1/11/30	1 T W 20	2.34
	1/12	1 T W 20	2.34
	1/13	1 T W 20	2.34
1/15/30	1/15	1 T W 20	2.34
1/16	1/16	1 T W 20	2.34
1/17	1/17	1 T W 20	2.34
1/17	1/17	1 T W 20	2.34
1/18	1/18	1 T W 20	2.34
1/19	1/19	1 T W 20	2.34
1/20	1/20	1 T W 20	2.34
	1/20	1 T W 20	2.34
1/23	1/23	1 T W 20	2.34
1/24	1/24	1 T W 20	2.34
	1/24	1 T W 20	2.34
1/25	1/25	1 T W 20	2.34
1/26	1/26	1 T W 20	2.34
1/27	1/27	1 T W 20	2.34
	1/27	1 T W 20	2.34
1/31	1/31	1 T W 20	2.34
2/1	2/1	1 T W 20	2.34
2/2	2/2	1 T W 20	2.34
	2/2	1 T W 20	2.34
2/6	2/6	1 T W 20	2.24
2/7	2/7	1 T W 20	2.24
2/8	2/8	1 T W 20	2.24
2/9	2/9	1 T W 20	2.24
2/13	2/13	1 T W 20	2.24
2/14	2/14	1 T W 20	2.24
2/15	2/15	1 T W 20	2.24
2/16	2/16	1 T W 20	2.24
2/18	2/18	1 T W 20	2.24
2/20	2/20	1 T W 20	2.24
2/22	2/22	1 T W 20	2.24
2/27	2/27	1 T W 20	2.24
2/28	2/28	1 T W 20	2.24
3/1	3/1	1 T W 20	2.24
	3/1	1 T W 20	2.24
3/2	3/2	1 T W 20	2.24
	3/2	1 T W 20	2.24
3/4	3/4	1 T W 20	2.24
3/6	3/6	1 T W 20	2.24

FEDERAL TRADE COMMISSION

Order No. 3433 *Commissioner's Exhibit No. 126A*

IN THE MATTER OF *Crystal Pure Candy Co.*

DATE *1/15/30* WITNESS

REPORTED BY *FISHER*

TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 6/19/38 TO 12/31/39

Crystal Pure Candy Co.  
(continued from page 18)

DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
3/7/39	3/7/39	1 T W 20	2.24
	3/7	1 T W 20	2.24
3/8/39	3/8	1 T W 20	2.24
	3/8	1 T W 20	2.24
3/10	3/10	1 T W 20	2.24
3/11	3/11	1 T W 20	2.24
3/13	3/13	1 T W 20	2.24
3/14	3/14	1 T W 20	2.24
	3/14	1 T W 20	2.24
3/15	3/15	1 T W 20	2.24
	3/15	1 T W 20	2.24
3/16	3/16	1 T W 20	2.24
3/17	3/17	1 T W 20	2.24
3/20	3/20	1 T W 20	2.24
3/22	3/22	1 T W 20	2.24
	3/22	1 T W 20	2.24
3/23	3/23	1 T W 20	2.24
	3/23	1 T W 20	2.24
3/28	3/28	1 T W 20	2.24
	3/28	1 T W 20	2.24
3/29	3/29	1 T W 20	2.24
3/30	3/30	1 T W 20	2.24
3/31	3/31	1 T W 20	2.24
4/3	4/3	1 T W 20	2.24
4/4	4/4	1 T W 20	2.24
4/5	4/5	1 T W 20	2.24
4/6	4/6	1 T W 20	2.24
4/7	4/7	1 T W 20	2.24
4/11	4/11	1 T W 20	2.24
4/12	4/12	1 T W 20	2.24
4/13	4/13	1 T W 20	2.24
4/14	4/14	1 T W 20	2.24
4/17	4/17	1 T W 20	2.24
4/18	4/18	1 T W 20	2.24
	4/18	1 T W 20	2.24
4/19	4/19	1 T W 20	2.24
	4/20	1 T W 20	2.24
	4/21	1 T W 20	2.24
	4/21	1 T W 20	2.24
	4/24	1 T W 20	2.24
	4/24	1 T W 20	2.24
	4/25	1 T W 20	2.24
	4/26	1 T W 20	2.24
	4/27	1 T W 20	2.24
	4/27	1 T W 20	2.24
	4/28	1 T W 20	2.24
	5/1	1 T W 20	2.24
	5/1	1 T W 20	2.24
	5/8	1 T W 20	2.24
	5/8	1 T W 20	2.24

PRINTED AT THE CHICAGO TRIBUNE

CHICAGO, ILL. 3-23-39

1268  
continued

PINHEM

TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 6/19/36 TO 12/31/39

Crystal Pure Candy Co.  
(continued from page 19)

<u>DATE OF ORDER</u>	<u>DELIVERY DATE</u>	<u>QUANTITY</u>	<u>PRICE</u>
4/19/39	5/3	1 T W 3*	2.29
	5/4	1 T W 3*	2.29
	5/5	1 T W 2*	2.24
	5/6	1 T W 2*	2.24
	5/9	1 T W 2*	2.24
	5/10	1 T W 2*	2.24
	5/11	1 T W 2*	2.24
	5/12	1 T W 2*	2.24
	5/12	1 T W 2*	2.24
	5/15	1 T W 2*	2.24
	5/16	1 T W 2*	2.24
	5/16	1 T W 2*	2.24
	5/17	1 T W 2*	2.24
	5/18	1 T W 2*	2.24
	5/18	1 T W 2*	2.24
	5/19	1 T W 2*	2.24
	5/19	1 T W 2*	2.24
5/23	5/23	1 T W 2*	2.29
5/24	5/24	1 T W 2*	2.29
5/25	5/25	1 T W 2*	2.29
	5/25	1 T W 2*	2.29
5/26	5/26	1 T W 2*	2.29
5/27	5/27	1 T W 2*	2.29
5/29	5/29	1 T W 2*	2.29
5/31	5/31	1 T W 2*	2.29
	5/31	1 T W 2*	2.29
6/1	6/1	1 T W 2*	2.29
5/23	5/23	1 T W 2*	2.29
6/2	6/2	1 T W 2*	2.29
6/2	6/2	1 T W 2*	2.29
6/3	6/3	1 T W 2*	2.29
6/5	6/5	1 T W 2*	2.29
6/6	6/6	1 T W 2*	2.29
	6/6	1 T W 2*	2.29
6/7	6/7	1 T W 2*	2.29
6/8	6/8	1 T W 2*	2.29
6/9	6/9	1 T W 2*	2.29
	6/9	1 T W 2*	2.29
6/10	6/10	1 T W 2*	2.29
6/12	6/12	1 T W 2*	2.29
6/13	6/13	1 T W 2*	2.29
6/14	6/14	1 T W 2*	2.29
	6/14	1 T W 2*	2.29
6/15	6/15	1 T W 2*	2.29
6/16	6/16	1 T W 2*	2.29
6/19	6/19	1 T W 2*	2.29
6/19	6/19	1 T W 2*	2.29
6/20	6/20	1 T W 2*	2.29
6/21	6/21	1 T W 2*	2.29
6/22	6/22	1 T W 2*	2.29
6/23	6/23	1 T W 2*	2.29
	6/23	1 T W 2*	2.29

FEDERAL TRADE COMMISSION  
WASHINGTON, D. C. 20540  
IN THE MATTER OF Crystal Pure Candy Co.  
REPORT  
FARMER

TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 6/19/26 TO 12/31/29

Crystal Pure Candy Co.  
(continued from page 20).

DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
6/26/29	6/26	1 TW 20	2.29
6/27	6/27	1 TW 20	2.29
6/28	6/28	1 TW 20	2.29
6/29	6/29	1 TW 20	2.29
6/30	6/30	1 TW 20	2.29
7/1	7/1	1 TW 20	2.29
7/2	7/2	1 TW 20	2.29
7/3	7/3	1 TW 20	2.29
7/4	7/4	1 TW 20	2.29
7/5	7/5	1 TW 20	2.29
7/6	7/6	1 TW 20	2.29
7/7	7/7	1 TW 20	2.24
7/10	7/10	1 TW 20	2.24
7/11	7/11	1 TW 20	2.24
7/12	7/12	1 TW 20	2.24
7/13	7/13	1 TW 20	2.24
7/14	7/14	1 TW 20	2.24
7/15	7/15	1 TW 20	2.24
7/17	7/17	1 TW 20	2.24
7/18	7/18	1 TW 20	2.24
7/19	7/19	1 TW 20	2.24
7/20	7/20	1 TW 20	2.24
7/21	7/21	1 TW 20	2.24
7/22	7/22	1 TW 20	2.24
7/23	7/23	1 TW 20	2.14
7/24	7/24	1 TW 20	2.14
7/25	7/25	1 TW 20	2.14
7/26	7/26	1 TW 20	2.14
7/27	7/27	1 TW 20	2.14
7/28	7/28	1 TW 20	2.14
7/31	7/31	1 TW 20	2.14
8/1	8/1	1 TW 20	2.14
8/2	8/2	1 TW 20	2.14
8/3	8/3	1 TW 20	2.14
8/4	8/4	1 TW 20	2.14
8/7	8/7	1 TW 20	2.14
8/8	8/8	1 TW 20	2.14
8/9	8/9	1 TW 20	2.14
8/10	8/10	1 TW 20	2.14
8/11	8/11	1 TW 30	2.19
8/12	8/12	1 TW 30	2.19
8/14	8/14	1 TW 20	2.14
8/15	8/15	1 TW 20	2.14
	8/16	1 TW 20	2.14
	8/17	1 TW 20	2.14
	8/18	1 TW 20	2.14
	8/19	1 TW 20	2.14
	8/21	1 TW 20	2.14
	8/21	1 TW 20	2.14

FEDERAL TRADE COMMISSION  
Under 14, 16, 33

IN THE MATTER OF Crystal Pure Candy Co.

DATE

WITNESS

REPORTER

FISHER

TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 8/19/36 TO 12/31/39

Crystal Pure Candy Co.  
(continued from page 21)

DATE OF  
ORDERDELIVERY  
DATEQUANTITYPRICE

8/15/39

8/22	1 T W 20	2.14
8/23	1 T W 20	2.14
8/24	1 T W 20	2.14
8/25	1 T W 20	2.14
8/26	1 T W 20	2.14
8/29	1 T W 20	2.14
8/30	1 T W 20	2.14
8/30	1 T W 20	2.14
8/31	1 T W 20	2.14
9/1	1 T W 20	2.14
9/5	1 T W 20	2.14
9/6	1 T W 20	2.14
9/6	1 T W 20	2.14
9/7	1 T W 20	2.14
9/8	1 T W 20	2.14
9/8	1 T W 20	2.14
9/11	1 T W 20	2.14
9/11	1 T W 20	2.14
9/12	1 T W 20	2.14
9/12	1 T W 20	2.14
9/13	1 T W 20	2.14
9/16	1 T W 20	2.14
9/16	1 T W 20	2.19
9/19	1 T W 20	2.19
9/19	1 T W 20	2.19
9/20	1 T W 20	2.19
9/20	1 T W 20	2.19
9/21	1 T W 20	2.19
9/21	1 T W 20	2.19
9/22	1 T W 20	2.19
9/22	1 T W 20	2.19
9/23	1 T W 20	2.19
9/25	1 T W 20	2.19
9/26	1 T W 20	2.19
9/26	1 T W 20	2.19
9/27	1 T W 20	2.19
9/27	1 T W 20	2.19
9/28	1 T W 20	2.19
9/28	1 T W 20	2.19
9/29	1 T W 20	2.19
9/29	1 T W 20	2.19
9/30	1 T W 20	2.19
10/2	1 T W 20	2.19
10/3	1 T W 20	2.19
10/3	1 T W 20	2.19
10/4	1 T W 20	2.19
10/4	1 T W 20	2.19
10/5	1 T W 20	2.19
10/6	1 T W 20	2.19
10/6	1 T W 20	2.19
10/7	1 T W 20	2.19

8/23

WITNESS

FISHER



TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 6/19/36 TO 12/31/39

Crystal Pure Candy Co.  
(continued from page 22)

DATE OF ORDER	DELIVERY DATE	QUANTITY	PRICE
10/9/39	10/9	1 T W 20	2.29
10/10	10/10	1 T W 20	2.29
10/11	10/11	1 T W 20	2.29
10/11	10/11	1 T W 20	2.29
10/12	10/12	1 T W 20	2.29
10/13	10/13	1 T W 20	2.29
10/20	10/20	1 T W 20	2.29
	10/20	1 T W 20	2.29
10/23	10/23	1 T W 20	2.19
10/25	10/25	1 T W 20	2.19
	10/25	1 T W 20	2.19
	10/25	1 T W 20	2.19
10/26	10/26	1 T W 20	2.19
10/28	10/28	1 T W 20	2.19
10/30	10/30	1 T W 20	2.19
	10/30	1 T W 20	2.19
	10/30	1 T W 20	2.19
10/31	10/31	1 T W 20	2.19
	10/31	1 T W 20	2.19
	10/31	1 T W 20	2.19
11/1	11/1	1 T W 20	2.19
	11/1	1 T W 20	2.19
	11/1	1 T W 20	2.19
11/2	11/2	1 T W 20	2.29
	11/2	1 T W 20	2.19
	11/2	1 T W 20	2.19
11/3	11/3	1 T W 20	2.19
	11/3	1 T W 20	2.19
11/4	11/4	1 T W 20	2.19
	11/4	1 T W 20	2.19
11/6	11/6	1 T W 20	2.19
	11/6	1 T W 20	2.19
	11/6	1 T W 20	2.19
11/7	11/7	1 T W 20	2.19
	11/7	1 T W 20	2.19
	11/7	1 T W 20	2.19
11/8	11/8	1 T W 20	2.19
	11/8	1 T W 20	2.19
	11/8	1 T W 20	2.19
11/9	11/9	1 T W 20	2.19
	11/9	1 T W 20	2.19
11/10	11/10	1 T W 20	2.19
	11/10	1 T W 20	2.19
	11/10	1 T W 20	2.19
11/11	11/11	1 T W 20	2.19
	11/11	1 T W 20	2.19
11/13	11/13	1 T W 20	2.19
	11/13	1 T W 20	2.19
	11/13	1 T W 20	2.19
11/9	11/9	1 T W 20	2.19

FEDERAL TRADE COMMISSION  
Serial No. 36-33  
IN THE MATTER OF *Crystal Pure Candy Co.*  
DATE \_\_\_\_\_ WITHIN \_\_\_\_\_  
REPORTER \_\_\_\_\_  
FINDER \_\_\_\_\_

TANE WAGON DELIVERIES TO CHICAGO CONFINCTIONERS 6/19/36 TO 12/31/36

Crystal Pure Candy Co. (continued from page 28)	DATE OF	DELIVERY	QUANTITY	PRICE
	ORDER	DATE		
11/14/39		11/14	1 T W 20	2.19
		11/14	1 T W 20	2.19
11/15		11/14	1 T W 20	2.19
		11/15	1 T W 20	2.19
11/16		11/15	1 T W 20	2.19
		11/16	1 T W 20	2.19
11/17		11/16	1 T W 20	2.19
		11/17	1 T W 20	2.19
11/18		11/17	1 T W 20	2.19
		11/18	1 T W 20	2.19
11/20		11/18	1 T W 20	2.19
		11/20	1 T W 20	2.14
11/21		11/20	1 T W 20	2.14
		11/21	1 T W 20	2.14
11/22		11/21	1 T W 20	2.14
		11/22	1 T W 20	2.14
11/24		11/22	1 T W 20	2.14
		11/24	1 T W 20	2.14
11/25		11/24	1 T W 20	2.14
		11/25	1 T W 20	2.14
11/27		11/25	1 T W 20	2.14
		11/27	1 T W 20	2.14
11/28		11/27	1 T W 20	2.14
		11/28	1 T W 20	2.14
11/29		11/28	1 T W 20	2.14
		11/29	1 T W 20	2.14
		11/29	1 T W 20	2.14
		11/30	1 T W 20	2.14
		11/30	1 T W 20	2.14
		11/30	1 T W 20	2.14



TANK WAGON DELIVERIES TO CHICAGO CONFECTIONERS 6/19/36 TO 12/31/39

Crystal Pure Candy Co.  
(continued from page 25)

<u>DATE OF ORDER</u>	<u>DELIVERY DATE</u>	<u>QUANTITY</u>	<u>PRICE</u>
11/29/39	12/13/39	1 TW 2*	2.14
	12/14	1 TW 2*	2.14
	12/14	1 TW 2*	2.14
	12/15	1 TW 2*	2.14
	12/15	1 TW 2*	2.14
	12/16	1 TW 2*	2.14
	12/16	1 TW 2*	2.14
	12/18	1 TW 2*	2.14
	12/19	1 TW 2*	2.14
	12/19	1 TW 2*	2.14
	12/20	1 TW 2*	2.14
	12/21	1 TW 2*	2.14
	12/22	1 TW 2*	2.14
	12/26	1 TW 2*	2.14
	12/27	1 TW 2*	2.14
	12/28	1 TW 2*	2.14
	12/29	1 TW 2*	2.14

Order No. 3633

1263

Con. Prod.

10/9/40

Chapley

PIERCE

Commission's Exhibit No. 127.

## COMMISSION'S EXHIBIT NO. 127

CORN SYRUP LOANED SHIPPERS TO CHICAGO COMMISSIONERS 6/19/36 TO 12/31/39

	<u>DATE OF ORDER</u>	<u>DATE SHIPPED</u>	<u>COMMODITY</u>	<u>PRICE</u>
Crystal Pure Candy Company	3/25/37	5/11/37	Tank Car 2-	\$2.55
	3/25	4/20	Tank Car 2-	2.55
	3/25	6/3	Tank Car 2-	2.55
	3/25	6/10	Tank Car 2-	2.55
	3/25	5/24	Tank Car 2-	2.55
	3/25	5/28	Tank Car 2-	2.55
	3/25	4/15	Tank Car 2-	2.55
	3/25/37	6/30/37	64 Bbls. 3-	\$2.55

\*(Taken from leased tank car.)

FEDERAL TRADE COMMISSION  
 No. 3633  
 U. S. DEPT. OF JUSTICE  
 127  
 Corn Products  
 12/26/39  
 Supply



444

Commission's Exhibit No. 160.

COMMISSION'S EXHIBIT NO. 160

E. J. BRACH & SONS  
8856 W. KINZIE ST.

PURCHASE ORDER NO 36759

TELEPHONE  
BROADFIELD  
1500

CHICAGO ILL.

7/6/34

1934

DATE

TO

Corn Products Sales Co

TERMS

4/10

ADDRESS

33311 N. Halsted St.

FOB

del.

P. O. & STATE

Chicago Ill

SHIP BY

QUANTITY SIZE DESCRIPTION PRICE PER

15 to Case 43° Crystal Pure Corn syrup

*Handwritten notes:*  
Don't know  
7/130 - 1 - (531) x  
✓ 9/10 - 1 - (60) x  
✓ 9/12 - 1 - (518) x  
(one)

*Handwritten:* N. K. Lane

*Handwritten:* 244 cut

✓ 8/13 - 1 - 59427 H (577) + (536)

✓ 8/1 - 1 - 59428

✓ 8/1 - 1 - 59444

✓ 9/12 - 1 - (518) x

*Handwritten:* Max Brewer  
4/12

UNIT FOR

CHARGE TO

THE ABOVE ORDER NUMBER MUST APPEAR ON ALL INVOICES, B/L'S, PACKAGES AND SHIPPING TICKETS

Attention: acceptance of this order and advice when shipment will be made. Packing or cartage charges are allowed unless specified as free. Read separate literature for each Purchase Order. Acceptance of this order shall be considered as acceptance of all provisions herein. Goods subject to our inspection on arrival. Notwithstanding prior payment in whole cash discount. Goods returned because of inferior quality or surplus ship will be returned to you. You to pay charge for transportation both ways, plus labor, reloading, trucking, etc., and are not to be returned except upon our instructions.

E. J. BRACH & SONS

BY

FEDERAL TRADE COMMISSION

Order 1636-3

380

*Handwritten:*  
Corn Products Sales Co  
10-40  
Johns

Commission's Exhibit No. 161.

445

COMMISSION'S EXHIBIT NO. 161.

E. J. BRACH & SONS

PURCHASE ORDER N<sup>o</sup> 44237

TELEPHONE  
MARSHFIELD  
1939

4300 W. KIRKE ST.

CHICAGO, ILL.

DATE

as

7

Com

Cap

TERMS

P.O.D.

SHIP BY

P. O. & STATE

QUANTITY	SIZE	DESCRIPTION	PRICE	PER
		51.5 1/2 in Corn Syrup		
		4. 1/2 in	364	net
3/14-1-	(524)	338 ✓		
3/15-1-	(531)	329 ✓		
3/16-1-	(529)	323 ✓		
5/16-1-	(505)	424 ✓		
7/27-	(529)	416 ✓		
UNIT FOR		CHARGE TO	120	

THE ABOVE ORDER NUMBER MUST APPEAR ON ALL INVOICES, B/L'S, PACKAGES AND SHIPPING TICKETS

Admission to this order and advice when shipment will be made. Packing or Chicago Charge and allowed (when specified on order) and amount for each Purchase Order. Acceptance of this order shall be considered as acceptance of all provisions herein. Goods added to any shipment on arrival, corresponding order payment to obtain such shipment. Goods returned because of defective quality or nonconformity will be returned to you, you to pay charges for transportation both ways, plus labor, handling, crating, etc., and are not to be returned except upon our instructions.

E. J. BRACH & SONS

*[Signature]*

7. 1939

381

3633

161

10-11-40

Corn Products Refg Co  
Schriener  
J. C. [Signature]

446

Commission's Exhibit No. 162.

COMMISSION'S EXHIBIT NO. 162.

E. J. BRACH & SONS  
4886 W. KINZIE ST.

PURCHASE ORDER NO. 44980

TELEPHONE  
KANSAS CITY 1-5  
1500

CITY '80 ILL

2/11/37

193

DATE

TO

Cm Rodul. Refs

TERMS

7/10

ADDRESS

Arps

P.O.

all

P.O. &amp; STATE

SHIP BY

QUANTITY	SIZE	DESCRIPTION	PRICE	TOT
15	1 1/2	45° crystal pure corn syrup	304	cut
6/3	1-4369	✓		
6/11	1-4515	(520) ✓		
1/11	1-4510	(510) ✓		
6/12	1-4574	(571) ✓		
4/18	1 tonche	(522) ✓		
4/21	1 "	(626) ✓		
7/1	7 tonche			
7/2	1-4508	(505) ✓		
BY	FOR	1-4512 (514) ✓	CHARGE TO	

THE ABOVE ORDER NUMBER MUST APPEAR ON ALL INVOICES, B/L'S, PACKAGES AND SHIPPING TICKETS

Acceptance of this order and advice when shipment will be made. Packing or Carriage Charges. E. J. Brach & Sons  
 are allowed unless specified on order. (2nd) express invoice for each Purchase Order. Acceptance of this  
 order shall be considered an acceptance of all provisions herein. Goods subject to our inspection on arrival.  
 notwithstanding prior payment to obtain cash discount. Goods returned because of inferior quality or workman-  
 ship will be returned to you. you to pay charge for transportation both ways, plus labor, reloading, handling,  
 etc., and are not to be replaced except upon our instructions.

FEDERAL TRADE COMMISSION

Serial No. 3633

Exhibit No. 162

382

IN THE MATTER OF

Corn Products Co.

DATE 10-11-40

H. J. Schaefer

REGISTERED

FBI

Commission's Exhibit No. 163.

447

COMMISSION'S EXHIBIT NO. 163.

E. J. BRACH & SONS  
4800 W. DIVER ST.

PURCHASE ORDER NO 44997

TELEPHONE  
BARRY 4-1513  
1200

CHICAGO ILL. 3/20/37

1937

DEL. DATE

Corn Products Ref Co

TERMS

P.O.D.

SHIP BY

P. O. & STATE

QUANTITY	SIZE	DESCRIPTION	PRICE	PER
10	43°	Corn syrup	3.00	
		Crystal pure	1	cut
<del>44-1-4446 (592)</del>				
46	1-	4446 (592)		
77	1-	4470 (592)		
76	8	broken		
	1/2			
	1/2			

CHARGE TO

THE ABOVE ORDER NUMBER MUST APPEAR ON ALL INVOICES, B/L'S, PACKAGES AND SHIPPING TICKETS

Authority to purchase of this order and advice when shipment will be made. Payment or Cash on Delivery can be made when specified in order. Good separate service for each Purchase Order. Acceptance of this order shall be considered as acceptance of all conditions herein. Goods subject to our inspection on arrival. Goods may be returned to us within 30 days of arrival. Goods returned because of inferior quality or nonconformity with our specifications will be returned to you. You are to pay charges for transportation both ways, plus labor, handling, unloading, etc., and are not to be returned except upon our instructions.

E. J. BRACH & SONS

BY

393

3633

165

at 100 100

4011

MADE IN U.S.A.

100-100

## COMMISSION'S EXHIBIT NO. 164.

FORM 222

C. P. S. NO. 89105

## CORN PRODUCTS SALES COMPANY

 WHITEHALL BUILDING  
 17 BATTERY PLACE  
 NEW YORK

 E. J. Brach & Sons,  
 4756 W. Kinzie Street,  
 Chicago, Illinois.

 Date 8/15/39  
 New Business \_\_\_\_\_  
 Confirming Wire \_\_\_\_\_  
 Trade No. 9  
 Customers Order No. \_\_\_\_\_  
 Speakers No. 3362

Dear Sir:

We are in receipt of your order through CPS Co. Chicago 015 tank cars #13 Crystal 3<sup>rd</sup> CSU

@ \$2.09



... for each day's detention of trailers  
 without consent of Seller the first five days if Buyer remanage term  
 30 days each day said term until same is delivered back  
 empty.

which is hereby confirmed upon the following terms and conditions:

Deliveries to be made as ordered subject to Seller's approval of Buyer's credit, before each shipment.

**SHIPMENT** F. O. B. cars at point of shipment freight prepaid in (carlots) to be made within 10 days from date of sale, unless otherwise stated above.**SHIPPING INSTRUCTIONS** To be furnished by Buyer within 7 days from date of sale and if not so furnished Seller has the option of making shipment within contract period, or to cancel contract without notice.**PAYMENT** 2% 10 days in New York or Chicago exchange due at Seller's New York office within 10 days from date of invoice.

If at any time before delivery the financial responsibility of the Buyer becomes impaired or unsatisfactory to the Seller, or Buyer should have failed to make payment for previous shipment in accordance with terms of sale, Seller may cancel any unshipped portion of the contract or require cash payment or satisfactory security before further shipment is made.

**DELAYS IN SHIPMENT** Seller shall in no case be held responsible for delay or storage charges at destination or for any damages arising from delayed shipments caused by strikes, accidents, car shortage, inability to produce supplies or interruptions of manufacture beyond its control; but if shipment is delayed beyond 10 days through Seller's default Buyer is entitled to any lower market price of Seller in effect on date of shipment or Buyer may cancel delayed order by telegram or letter, provided same is received by the Seller before shipment of such order, otherwise order remains uncancelled.**ROUTING** Seller reserves the right to ship from any factory or point and select the routing. Every effort will be made to respect Buyer's wishes as to delivery lines where substantial reason is given. Buyer assumes risk of leakage and damage after delivery to carrier in good condition. Where shortage or damage is apparent on arrival, Buyer should always receipt for goods to the transportation carrier in damaged condition and notify Seller immediately.

No sales are binding upon this company until accepted in writing at the principal office of Seller in New York. Salesmen and local brokers are not empowered to execute or modify contracts for Seller.

The prepaid price herein named is subject to change either up or down, according to any advance or decline in the freight rate on any portion not shipped at the time such rate change becomes effective.

Seller not to be responsible for the adaptability of the goods to be delivered on this contract for any specific purpose unless specially and separately provided for in this contract.

Any duty, excise or other tax or charge, Federal, State or Municipal, hereafter imposed on the products covered hereby, or its manufacture, refining or sale, shall be added to the price herein specified.

If our regular market price on date of arrival in your market of any shipment against this contract is lower than price at which such shipments are booked, you will have the benefit of such lower price.

It is agreed that the goods sold under this contract are for consumption in the United States only and not for export.

FEDERAL TRADE COMMISSION

Respectfully yours,

CORN PRODUCTS SALES COMPANY

SOLD BY 3433

BY THE WAY OF

DATE 10-11-40

RECEIVED

384



449

E. J. BRACH & SONS  
444 W. KINZIE ST.  
CHICAGO, ILL. 8/15/39

**PURCHASE ORDER    №    15935**

TELEPHONE  
HARD COPY  
1000

TO Corn Products

PAGE 2/10

20

2012 27

P. G. A. SMITH

[illegible]

THE ABOVE ORDER NUMBER MUST APPEAR ON ALL INVOICES, B/L'S, PACKAGES AND SHIPPING TICKETS

The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and is being furnished to you for your information.

**U. I. MAC**

1

FEDERAL TRADE COMMISSION

Serial No. 3633

IN THE MATTER OF Product Red

DATE 10-11-40 WITH LON

14. 11. 2019

## Discussion

385

450

Commission's Exhibit No. 166

COMMISSION'S EXHIBIT NO. 166.

## CORN PRODUCTS SALES COMPANY

WHITMALL BUILDING  
17 BATTERY PLACE  
NEW YORK

#090140

C. P. S. NO. 973

Es J. Brach & Sons,  
4656 W. Kinzie St.,  
Chicago, Ill.

Date 6/7/33

New Business

Confirming Wire

Trade No. 9

Customers Order No.

Brokers No. 2-10

Dear Sir

We are in receipt of your order through

CPS Co. Chicago

2 tank cars #13 Crystal 3- CSU

@ \$2.14 per 100

pH 4.9 to 5.1 Better than average, u&amp;g test.

FEDERAL TRADE COMMISSION

File # 3633

In re: Corn Products Co.

Date 10-11-40

RECEIVED

30 days

which is hereby confirmed upon the following terms and conditions:

Deliveries to be made as ordered subject to Seller's approval of Buyer's credit, before each shipment.

**SHIPMENT** To be made at point of shipment freight prepaid in (carlots) to be made within 10 days from date of order unless otherwise stated above.**SHIPPING INSTRUCTIONS** To be furnished by Buyer within 5 days from date of sale and if not so furnished, Seller has the option of making shipment within contract period, or to cancel contract without notice.**PAYMENT** 2 1/2 10 days in New York or Chicago exchange due at Seller's New York office within 10 days from date of invoice.

If at any time before delivery the financial responsibility of the Buyer becomes impaired or unsatisfactory to the Seller, or Buyer should have failed to make payment for previous shipment in accordance with terms of sale, Seller may cancel any unshipped portion of the contract or require cash payment or satisfactory security before further shipment is made.

**DELAYS IN SHIPMENT** Seller shall in no case be held responsible for demurrage or storage charges at destination or for any damages arising from delayed shipments caused by strikes, accidents, car shortage, inability to produce supplies or interruptions of manufacture beyond its control, but if shipment is delayed beyond 10 days through Seller's default, Buyer is entitled to any lower market price of Seller in effect on date of shipment or Buyer may cancel delayed order by telegram or letter, provided same is received by the Seller before shipment of such order, otherwise order remains uncancelled.**ROUTING** Seller reserves the right to ship from any factory or point and select the routing. Every effort will be made to respect Buyer's wishes as to delivery lines where substantial reason is given. Buyer assumes risk of leakage and damage after delivery to carrier in good condition. Where shortage or damage is apparent on arrival, Buyer should always report for goods to the transportation company in damaged condition and notify Seller immediately.

No sales are binding upon this company until accepted in writing at the principal office of Seller in New York. Salesmen and local brokers are not empowered to execute or modify contracts for Seller.

The prepaid price herein named is subject to change either up or down, according to any advance or decline in the freight rate on any portion not shipped at the time such rate change becomes effective.

Seller not to be responsible for the adaptability of the goods to be delivered on this contract for any specific purpose unless specially and separately provided for in this contract.

Any duty, excise or other tax or charge, Federal, State or Municipal, hereafter imposed on the products covered hereby, or its manufacture, refining or sale, shall be added to the price herein specified.

If our regular market price on date of arrival in your market of any shipment against this contract is lower than price at which such shipments are invoiced, you will have the benefit of such lower price.

It is agreed that the goods sold under this contract are for consumption in the United States only and that for export

Respectfully yours,

CORN PRODUCTS SALES COMPANY

per Douglas J. Kemmer

386

431

**PURCHASE ORDER N° 16571**

444 W. KENDAL ST.

CHICAGO, Ill.

9/1739

352

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

Cori Products

**Abstract**

242

1992

543

[illegible]

THE ABOVE ORDER NUMBER MUST APPEAR ON ALL INVOICES, B/L'S, PACKAGES AND SHIPPING TICKETS

Any alterations or changes in the order shall be made at the discretion of the Ship. The Ship is not responsible for any loss or damage to the cargo or for any delay in the delivery of the cargo. The Ship is not responsible for any loss or damage to the cargo or for any delay in the delivery of the cargo. The Ship is not responsible for any loss or damage to the cargo or for any delay in the delivery of the cargo.

2.1.00

2

PLEASE, THANK YOU VERY MUCH

total 3633

**Figure 1**

488

1950-1951 年

**Abstract**

387

## COMMISSION'S EXHIBIT NO. 168.

CORN SYRUP UNMIXED SHIPMENTS TO CHICAGO CONFECTIONERS 6/19/36 TO 12/31/39

	DATE OF ORDER	DATE SHIPPED	COMMODITY	PRICE
Genul Specialty Company	6/25/36	6/27/36	45 Drums 3c	\$2.57
	7/6/36	6/14/36	25-50 Gal. Kegs 3c	3.52
	"	6/12/36	50 Drums 3c	2.57
	7/2/36	6/29/36	Tank Car 3c	2.46
	"	7/2/36	Tank Car 3c	2.46
	"	"	10 Drums 3c	2.57
	3/23/37	4/27/37	25 Drums 3c	3.17
	"	4/27/37	20 Drums 2c	3.12
	"	5/10/37	Tank Car 3c	3.04
	4/27/37	6/11/37	Tank Car 3c	3.04
	7/16/37	4/27/37	5 Drums 3c	3.37
	"	7/16/37	4 Bbls. 3c	3.61
	3/29/38	7/2/38	30 Drums 3c	2.37
	9/19/38	9/29/38	20 Drums 3c	2.27
	11/14/38	1/24/39	20 Drums 3c	2.22
	4/19/39	5/20/39	20 Drums 3c	2.32
	6/27/39	7/17/39	40 Drums 3c	2.32
	8/15/39	10/2/39	25-5 Gal. Kegs 3c	3.27
	11/21/39	11/29/39	30 Drums 3c	2.22
	"	"	20 Drums 3c	2.22
	"	"	10-10 Gal. Kegs 3c	3.07
	"	"	"	"

388

FEDERAL TRADE COMMISSION  
 Serial No. 3633 RECEIVED Exhibit No. 168  
 IN THE MATTER OF Corn Producers Ref Co  
 DATE 10-11-40 BY W. H. C. Kelly  
 REPORTED BY W. H. C. Kelly

Commission's Exhibit No. 169.

453

COMMISSION'S EXHIBIT NO. 160.

CORN SYRUP UNMIXED SHIPMENTS TO CHICAGO CONFECTIONERS 5/19/36 TO 12/31/39

	DATE OF ORDER	DATE SHIPPED	COMMODITY	PRICE
Walter Birk Candy Co.	3/25/37	5/26/37 6/8/37	Tank Car 3- Tank Car 3-	\$3.04 3.04

FEDERAL TRADE COMMISSION  
Serial No. 3653 OF WHICH NO. 169  
IN THE MATTER OF Corn Products Ref Co  
DATE 10-11-40 STATES Cyll  
REPORTER Honford  
FISHER

389



## COMMISSION'S EXHIBIT NO. 170.

CORN SYRUP UNMIXED SHIPMENTS TO CHICAGO CONFECTIONERS 6/19/36 TO 12/31/39

	<u>DATE OF ORDER</u>	<u>DATE SHIPPED</u>	<u>COMMODITY</u>	<u>PRICE</u>
Walter H. Johnson Candy Co.	3/25/37	5/13/37	Tank Car 3-	\$3.04
"	"	5/2/37	Tank Car 3-	3.04
"	"	6/5/37	Tank Car 3-	3.04
"	"	6/15/37	Tank Car 3-	3.04

390

FEDERAL TRADE COMMISSION

Serial No. 3633

IN THE S.

DATE 10-11-40

REPORTER

F. B. I.

Commission's Exhibit No. 171.

455

COMMISSION'S EXHIBIT NO. 171.

FEDERAL TRADE COMMISSION  
Caption No. 3637  
IN THE MATTER OF *Curtiss Candy Co.*  
DATE *11/17/30* WITNESS *John J. Fisher*  
REPORTER *Shirley*  
FISHER

**Baby Ruth** WT. 7 1/2 OZ. **CURTISS** **CANDY** U.S. PAT. 2001

**Baby Ruth**

INCLOSURE ON REVERSE SIDE

**RICH IN DEXTROSE**  
THE SUGAR YOUR BODY USES DIRECTLY FOR ENERGY

**CURTISS CANDIES**

MADE BY CURTISS CANDY CO. CHICAGO, ILL.





Commission's Exhibit No. 172.

457

AUG. No. 8

172C



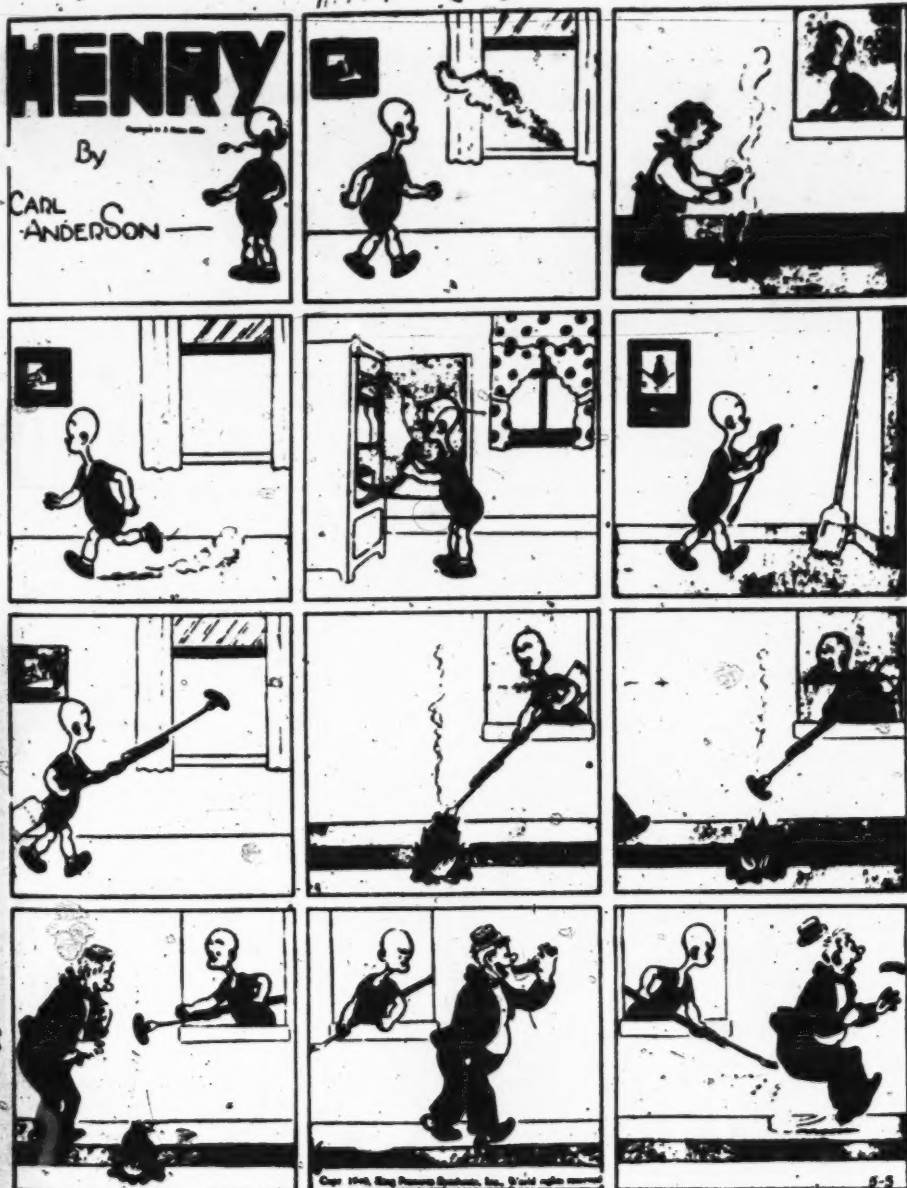
# FLASH COMICS

10¢

FEDERAL TRADE COMMISSION  
Docket No. 3683 COMMISSIONER'S EXHIBIT No. 172C  
IN THE MATTER OF *Samuel Reed*  
DATE *10/20/40* WITNESS *John W. Schumaker*  
MANUFACTURED BY *Blumley*



## COMMISSION'S EXHIBIT NO. 175



"Read the adventures of Henry, the funniest American, every weekday in the New York Daily Mirror."



WHAT IS THE  
TALLEST  
TREE IN U.S.A?  
— (ANSWER: JOLLY JACK)

**JOLLY JACK**  
CANDY IS DELICIOUS FOOD—ENJOY SOME EVERY DAY

IS RICH IN PURE  
**DEXTROSE**  
THE SUGAR  
YOUR BODY NEEDS  
EASILY FOR ENERGY



AMERICA'S  
CALORIC  
RESPONSE  
363 FL  
OZ

1947  
Jolly Jack  
Candy



COMMISSION'S EXHIBIT NO. 178

FEDERAL TRADE COMMISSION

total no. 343 ~

српско-1993 128

IN THE MATTER OF

DATE 10/22/91

.. SWING GIRL *Lehman*

Witness *[Signature]*

Somehow, she wasn't disappointed when she could only stare at him, her heart

THE ATTACHED AD APPEARED IN  
THE FOLLOWING MAGAZINES:

The Avenger  
Detective Story  
Doc Savage  
Clues-Detective  
Unknown  
Astounding Stories

Romantic Range  
Mystery Stories  
Sport Story  
Athlete  
The Shadow  
Love Story  
Western Story  
Wild West Weekly

OVER THE SIDE OF THE boat, took a coat around her shoulders. She opened her eyes faintly and stared into Dean's white, anguished face. He was rubbing her cold hands and arms vigorously.

"You're all right now, aren't you? You have to be! It was your singing that saved us. The coast guard heard—" His voice broke off and he caught her to him fiercely. "Oh, Kaye, you're the bravest— Darling, I love you so!"

"Then we can go on singing together all the rest of our lives, my darling little wife. You know, somehow, opera and swing music make a grand combination!"

His lips were crushing hers and with a blissful sigh Kayo relaxed in his arms. There were no words to describe their glory as they clung together. In Kayo's eyes were stars, in her heart a song. A song that was echoed in every throbbing, pulsing beat of Dean's own.

# Butterfinger

**WHAT IS THE  
OLDEST SCIENCE  
KNOWN TO  
MANKIND?**

DEXTRON

**CANDY IS DELICIOUS FOOD ... ENJOY SOME EVERY DAY**

# LOVE STORY

MAGAZINE

TENCENTS



*Miss Townsend*

By **ETHEL LE COMPTE**

**MAD PURSUIT** By **ALICE MARIE DODGE**

1102  
Page 52

men -  
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place  
right.

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d hall  
men have  
he's eat  
ate and  
want  
and  
the wife

men -  
it's  
the like  
pos had  
the had

REAL ESTATE COMMISSION  
Cory  
1785  
with  
Shupley



1630 COMMISSION'S EXHIBIT NOS. 182a-182b

RADIO COMMERCIALS

(Typical Spot Announcements)

(Broadcast by

Curtiss Candy Company

over

local and metropolitan  
Stations.)

Keep your children charged with food-energy. Keep their bodies supplied with Dextrose. There's lots of Dextrose in Baby Ruth Candy.

During school recess . . . lunch hours . . . after school, let your youngsters enjoy Baby Ruth Candy. It is rich in Dextrose—food-energy sugar.

Baby Ruth Candy is wholesome and energizing. Even very young children can enjoy it safely. Baby Ruth is rich in pure Dextrose.

Wise parents insist upon their children eating Baby Ruth Candy. It's pure, delicious and energizing because it's rich in Dextrose.

Children of all ages crave candy. Baby Ruth is particularly beneficial and energizing because it's so rich in Dextrose.

1661 Don't worry about children's appetite for sweets. Give them Baby Ruth Candy. Baby Ruth's rich in Dextrose, the vital food-energy sugar.

Growing children constantly need food-energy to keep them active. Baby Ruth Candy is rich in pure Dextrose, the great food-energy sugar.

Mothers who realize the great food-energy value of the vital sugar Dextrose, satisfy their children's sweet tooth with Baby Ruth Candy.

When children want candy Mothers can safely give them Baby Ruth. This pure, delicious candy is rich in Dextrose, the great food-energy sugar.

1662 COMMISSION'S EXHIBIT NOS. 183a-183b-183c

E. W. HELLWIG COMPANY—9 East 40th Street—  
New York

March 29, 1937.

Commercial announce-  
ments for use by  
Station WLW, Cin-  
cinnati, Ohio.

"TOY TOWN BAND"  
program

Here's a little story for you: In the great steel mills, where husky men work very hard under terrific heat, even the strongest of them often suffer exhaustion . . . "heat exhaustion". Do you know how these men are revived . . . and their energy restored? They are given pure Dextrose, the great energy sugar which supplies fuel to every cell and muscle in the body. Now Baby Ruth, America's favorite 5¢ candy bar, is rich in this very same Dextrose . . . and that's why we say that Baby Ruth is as energizing as it is delicious. Make Baby Ruth a daily habit . . . it's always a treat . . . always a source of real energy.

Lots of mothers have written us asking for more information about Dextrose, the energy sugar . . . and how it makes Baby Ruth candy so good for everyone. Well, it's simple to explain. Dextrose is a pure white sugar . . . which doctors call "body" or "muscle" sugar. It is the substance which makes your heart beat, your lungs breathe, your muscles move. Delicious Baby Ruth candy is so rich in Dextrose that it is more than just a fine pure candy.  
1662 . . . Baby Ruth is a real energizing food. Everyone enjoys Baby Ruth candy . . . and benefits by its wholesome energy value. Get Baby Ruth today . . . a big bar costs only five cents wherever candy is sold.

Every red-blooded boy and girl admires the flashing speed and strength of a great athlete. Now it takes energy . . . and lots of it . . . to be a star athlete . . . so here's something to remember. Many athletic coaches and trainers, before contests, give their athletes pure Dextrose, the great



energy sugar. Dextrose yields energy promptly, fights fatigue and builds up stamina. You, too, can get a rich supply of Dextrose every day if you eat Baby Ruth candy. You know how good Baby Ruth is . . . that it's pure, wholesome and delicious. But remember also that the Dextrose in Baby Ruth makes it a real energizing food; too, . . . the best candy you can buy.

To all our young friends . . . and their parents, too . . . we'd like to explain that Baby Ruth candy is not merely another candy . . . no . . . Baby Ruth is in a class by itself. Baby Ruth is pure, delicious and nourishing, of course, but it's also a great source of quick energy because it is so rich in pure Dextrose, the great energy sugar everyone needs to keep active and alert. Baby Ruth is equally energizing for young and old . . . it's great candy . . . 1664 and thanks to Dextrose, it teems with energy. Get a big 5¢ bar of Baby Ruth today.

At this time of year, many people feel listless . . . lazy. Jokingly, this physical let-down is called Spring Fever but it really means your energy is low. Now when there's work to be done, it's no fun to feel tired . . . so here's a tip. Baby Ruth candy contains just the very element our bodies need for energy. That substance is pure Dextrose, the amazing sugar which gives quick energy to the body almost instantly . . . "like magic", in fact. Dextrose is called the "muscle" sugar by doctors . . . it is fuel for the body. Baby Ruth candy, rich in Dextrose, is really an energy food, pure and delicious. So snap out of Spring Fever . . . eat a Baby Ruth or two . . . you'll find new energy, new vitality in every big 5¢ bar.

If you enjoy fine candy, you'll enjoy Baby Ruth, because every big bar of this pure confection is as pure and good as can be. But when you eat Baby Ruth, you must remember this. Baby Ruth is made with pure Dextrose, the great sugar your doctor will tell you is fuel for the body. Yes, Dextrose is the substance, the "fuel" that makes your mind and muscles work. So when you eat Baby Ruth candy . . . you are giving your palate a treat and your body a rich supply of reserve energy . . . to combat fatigue, to keep active and alert. So eat Baby Ruth every day . . . keep fatigue far away.

## UNITED STATES OF AMERICA

Before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 16th day of March, A. D. 1942.

## Commissioners:

William A. Ayres, Chairman,  
Garland S. Ferguson,  
Charles H. March,  
Ewin L. Davis,  
Robert E. Freer.

• • (Caption—Docket No. 3633) • •

## FINDINGS AS TO THE FACTS AND CONCLUSION

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission on October 21, 1938, issued and thereafter served its complaint in this proceeding upon respondents Corn Products Refining Company, a corporation, and Corn Products Sales Company, Inc., a corporation, charging them with violation of the provisions of subsection (a) of Section 2 of the said Clayton Act, as amended. After the issuance of said complaint and the filing of respondents' answer thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before examiners of the Commission theretofore duly designated by it.

On March 25, 1939, the Commission issued and thereafter served upon said respondents an amended complaint charging violation of subsections (a) and (c) of Section 2 and of Section 3 of the aforesaid Clayton Act, as amended. After the filing of respondents' answer to the amended complaint, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before examiners of the Commission theretofore duly designated by it, and the testimony and other evidence taken pursuant to both complaints were duly recorded and filed in the

office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the amended complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and oral arguments by counsel; and the Commission, having duly considered the same and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

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## FINDINGS AS TO THE FACTS

**Paragraph One:** Respondent Corn Products Refining Company is a corporation organized and existing under the laws of the State of New Jersey, having its principal office and place of business at 17 Battery Place, New York, New York. Respondent Corn Products Sales Company, Inc., is a corporation organized and existing under the laws of the State of New Jersey, having its principal office and place of business at 17 Battery Place, New York, New York. Corn Products Sales Company, Inc., is a wholly owned subsidiary of Corn Products Refining Company and is engaged in the sale and distribution of products manufactured by Corn Products Refining Company. The policies and operations of Corn Products Sales Company, Inc., are controlled and directed by Corn Products Refining Company.

**Paragraph Two:** Respondent Corn Products Refining Company is a large and important processor and refiner of corn and manufacturer of products and by-products of such processing and refining. It has an authorized capital stock of \$100,000,000 and owns and operates corn grinding and refining plants at Pekin and Argo, Illinois; North Kansas City, Missouri; and Edgewater, New Jersey. The Argo, Pekin, and North Kansas City plants have a corn grinding capacity in excess of 155,000 bushels per day, with facilities for the production of many products and by-products of corn, including all known corn starch products for both household and industrial use. It owns and operates can, carton, and printing plants for the production of containers for many of its packaged products. It distributes the products so manufactured to purchasers located in the States of New York and Illinois, and its subsidiary, Corn Products Sales Company, Inc., sells and distributes the products of its parent company in the other States of the United States and in the District of Columbia.

In the course and conduct of the aforesaid business respondents for many years have been, and are now, engaged in the sale and distribution of their various products which when sold, are transported in commerce from their plants through and into the various States of the United States and in the District of Columbia; and respondents have maintained, and now maintain, a course of trade in such various products in commerce in and among the various States of the United States and in the District of Columbia.

Paragraph Three: In the course and conduct of their aforesaid business, respondents produce, sell, and distribute starch, glucose or corn syrup, corn sugar, corn oil, gluten feed, corn oil cake, corn oil meal, and other products. In addition to the products sold in bulk, respondents have many branded products distributed to the public, including Kingsford and Duryea starches, Karo syrup, Mazola oil, Argocorn starch, Argo gloss starch, Kre-mel dessert unit, and Cerelose.

Of the many products and by-products of corn produced and sold by respondents, the ones of primary interest for the purposes of this proceeding are bulk glucose or corn syrup, corn starch and starch products derived therefrom, dextrose, and corn gluten feed and meal. Bulk glucose is a standard syrup used principally in the manufacture of candy and the mixing of table syrups. Corn starch, in addition to its well-known household uses, is extensively used in various forms in the paper, laundry, and cloth-making industries. Dextrose is a dry white sugar which is not as sweet as sugar produced from sugar cane or beets and is used principally in the candy, canning, and soft drink industries. Gluten meal is a by-product of corn refining consisting of corn hulls, husks, gluten, and other residues

33 remaining after the starch and germ have been removed from corn, and when sweetened with molasses is known as gluten meal. Both gluten feed and meal are principally used for the feeding of livestock.

Respondents' competitors in the manufacture, sale, and distribution of corn products and by-products, including the location of the plant of each, are: A. E. Staley Manufacturing Company, Decatur, Illinois; Clinton Company, Clinton, Iowa; Penick & Ford, Limited, Inc., Cedar Rapids, Iowa; American Maize-Products Company, Roby, Indiana; Union Starch & Refining Company, Granite City, Illinois; Anheuser-Busch, Inc., St. Louis, Missouri; and The Hubin-

ger Company, Keokuk, Iowa. Each of these concerns has national distribution of its products.

Paragraph Four: (a) Respondents began the distribution of glucose or corn syrup from their Argo plant, which is within the railroad switching district of Chicago, Illinois, in 1910 and from their Kansas City plant in 1922. This product is sold by respondents largely to candy manufacturers in railroad tank car lots of approximately 95,000 pounds each, in tank wagon or truck lots of approximately 12,000 pounds each, and in drums, barrels, half-barrels, 10-gallon kegs, and 5-gallon kegs. Respondents have concurrently sold glucose of like grade and quality to different purchasers at differing prices. Since June 19, 1936, and for many years prior thereto, respondents have sold bulk glucose to purchasers throughout the United States at delivered prices which were, and are, calculated upon the basis of the price in Chicago plus the railroad tariff rate from Chicago to the destination of the purchaser. Additional price differences among purchasers of glucose have been, and are, created by respondents through their practice of adding to the railroad tank car price additional sums, the amounts of such additions depending upon the type of container in which the glucose is delivered. Respondents have created other price differentials among purchasers through preferential application to some purchasers of their practice of allowing customers a period of days after a price increase has been announced within which such customers may purchase an amount of glucose at the price in effect before the announcement of the increase. This is known as the order "booking" system.

(b) Respondents have been, and are now, selling and shipping glucose or corn syrup, unmixed, of like grade and quality from their plants in Chicago, Illinois, and Kansas City, Missouri, to purchasers throughout the United States, some of which purchasers are located in the following cities: Chicago, Illinois; Kansas City, St. Joseph, and Springfield, Missouri; Fort Smith, Arkansas; Hutchinson, Kansas; Lincoln, Nebraska; Sioux City, Iowa; Waco, Sherman, and San Antonio, Texas; Denver, Colorado; and Salt Lake City, Utah. Sales to purchasers, including those in the cities named, are fulfilled by shipments of glucose from respondents' plant at Chicago, Illinois, or from their plant at Kansas City, Missouri, depending in each instance upon



the judgment of and subject to the entire control of respondents. With the exception of a few sales, shipments to fulfill which were made from respondents' plant at Chicago, Illinois, sales to purchasers located in all of the cities named above except Chicago (which cities are used for the purpose of illustrating respondents' selling and delivery practices) were fulfilled by shipments from respondents' plant at Kansas City, Missouri; a substantial number of the sales to purchasers in Chicago were fulfilled by deliveries from respondents' filling station in Chicago to which glucose had been shipped by respondents from their plants in Kansas City and Chicago; and a few such sales were fulfilled by shipments directly to customers in Chicago from respondents' plant in Kansas City. Many purchasers who bought glucose from respondents also purchased glucose from competitors of respondents. To illustrate the differing prices at which glucose was sold by respondents on particular dates, the following tabulation shows the prices per hundred pounds to purchasers in the cities named above for 43° Baume glucose in tank car lots on the dates stated:

Location of Purchaser	August 1 1936	August 1 1937	August 1 1938	August 1 1939
Chicago, Ill.	\$2.94	\$3.04	\$2.29	\$2.09
Kansas City, Mo.	3.32	3.40	2.69	2.49
St. Joseph, Mo.	3.32	3.40	2.69	2.49
Springfield, Mo.	3.32	3.40	2.69	2.49
Fort Smith, Ark.	3.58	3.64	2.94	2.74
Hutchinson, Kan.	3.53	3.60	2.90	2.70
Lincoln, Nebr.	3.37	3.45	2.74	2.54
Sioux City, Ia.	3.32	3.40	2.69	2.49
Waco, Texas	3.77	3.82	3.14	2.94
Sherman, Texas	3.68	3.74	3.06	2.86
San Antonio, Texas	3.74	3.84	3.17	2.97
Denver, Colo.	3.79	3.64	2.95	2.75
Salt Lake City, Utah	3.79	3.74	3.06	2.86

At all times between the dates set forth substantially the same differences in and relationships between and among said prices illustrated above existed as to purchasers so located, and these prices were charged and paid by such purchasers regardless of whether the glucose or corn syrup unmixed was shipped to such purchasers in the city named

from respondents' plant at Chicago, Illinois, or respondents' plant at Kansas City, Missouri.

(c) The illustrative prices set forth above were determined by respondents by following their general practice of adding to the prices shown for Chicago on the dates set forth, respectively, the then effective railroad tariff rate from Chicago to destination without reference to whether the sale would be fulfilled by shipment from Kansas City or from Chicago. Such rates in cents per hundred pounds, together with similar rates from Kansas City to the same destinations, were as follows:

	Aug. 1, 1936		Aug. 1, 1937		Aug. 1, 1938		Aug. 1, 1939	
	Chicago K.C.		Chicago K.C.		Chicago K.C.		Chicago K.C.	
Chicago, Ill.	0	38	0	36	40	40	0	40
Kansas City, Mo.	38	0	36	0	40	0	40	0
St. Joseph, Mo.	38	08	36	08	40	09	40	09
Springfield, Mo.	38	35	36	33	40	36	40	36
Fort Smith, Ark.	64	42	60	40	65	45	65	45
Hutchinson, Kan.	59	35	56	33	61	36	61	36
Lincoln, Nebr.	43	12	41	12	45	13	45	13
Louis City, Ia.	38	23	36	22	40	24	40	24
Lubbock, Texas	83	62	78	58	85	63	85	63
Meridian, Texas	74	52	70	49	77	54	77	54
San Antonio, Texas	85	67	80	63	88	69	88	69
Denver, Colo.	85	68	60	51	66	56	66	56
Salt Lake City, Utah	85	82	70	61	77	67	77	67

35 (d) Insofar as sales which are fulfilled by shipments from respondents' Chicago plant are concerned, although the differential in price to purchasers at various locations may not be precisely justified by the cost to respondents of delivery, because of milling, in transit rates and other freight rate adjustments, it does not appear that there is substantial unjustified discrimination under the pricing plan set forth above. It is plain, however, that a purchaser located in Kansas City who received delivery from respondents' Kansas City plant on the dates set out above paid respondents prices higher than the prices to a customer in Chicago by approximately the following percentages: August 1, 1936, 13 percent; August 1, 1937, 12 percent; August 1, 1938, 17 percent; August 1, 1939, 19

percent. The percentages vary with variations in the Chicago price as well as with rate changes. These higher prices were in no way warranted by additional delivery costs. Any purchaser who is located closer freightwise to Kansas City than to Chicago, Illinois, and who received delivery from Kansas City, was forced to pay a price which included delivery costs not incurred or paid by respondents. For example, the price to a purchaser in Waco, Texas, for such delivery included "phantom" freight delivery costs which made the price to him approximately 10 percent higher than to a Chicago purchaser. It is also plain that a purchaser in Chicago who received delivery from Kansas City purchased at a price which not only did not include any artificial freight, but which did not take into account the freight actually incurred and paid by respondents. Similarly, any purchaser located closer freightwise to Chicago than to Kansas City, and who received delivery from respondents' Kansas City plant, received a price which not only did not include any artificial freight but which did not include all the freight actually paid by respondents.

(c) Respondents did not attempt to show that the price differences illustrated in the first table in this paragraph made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such corn syrup was to such purchasers sold or delivered.

Paragraph Five: (a) In addition to the price differences as among customers of respondents which are created by the pricing system illustrated in the preceding paragraph, respondents have sold, and are now selling, glucose or corn syrup unmixed to different purchasers, wherever located, in containers of different sizes at prices per hundredweight in addition to the tank car price as follows:

Type of Container	Additional Price Per Cwt. Over Tank Car Prices	
Barrels	\$ .33	
Half-barrels	.58	
10-gallon kegs	.98	
5-gallon kegs	1.08	
Returnable steel drums	.13	where there is no return freight paid on empty drums.

Type of Container	Additional Price, Per Cwt. Over Tank Car Prices	
Returnable steel drums	.18	where the return freight on the empty drum is between 50¢ and 75¢ per cwt.
36 Returnable steel drums	.23	where the return freight on the empty drum is between 76¢ and 90¢ per cwt.
Returnable steel drums	.28	where the return freight on the empty drum is between 91¢ and \$1 per cwt.
Returnable steel drums	.33	where the return freight on the empty drum is more than \$1 per cwt.
Tank trucks	.10	where delivered by respondents' equipment.
Tank trucks	.02	where delivered by customers' equipment.

(b) Respondent made no effort to show that the price differences among their customers created by the afore-said container differentials were price differences which made only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities were to such purchasers sold or delivered.

Paragraph Six: (a) Price differences as among customers, in addition to those illustrated in Paragraphs Four and Five, have been created by respondents through the operation of the "booking" system hereinbefore mentioned. In case of a decline in their price for glucose it is the general policy of respondents to correspondingly reduce their prices to all customers as to undelivered orders or portions of orders which were taken at higher prices. In case of an advance in their price for glucose respondents attempt to notify the trade generally of such increase and by means of telephone calls, personal calls by their salesmen, or letter they inform all their customers of such increase. The general policy further provides that customers, within a period of days (formerly 10 and now 5) after an increase in price, may "book" or order from respondents, at the price in effect before the in-

crease, an amount of glucose not to exceed the customer's requirements for 30 days, and delivery of amounts so ordered must be accepted by the customer within 30 days from the date of the price increase under penalty of cancellation if not accepted. All such orders or bookings must be approved at the principal office of respondents, and they are there considered before acceptance, modification, or refusal. "Bookings" are not firm contracts of purchase but mere options. Actual sales pursuant to "bookings" occur when delivery of the glucose is ordered and it is then that the amount delivered is invoiced. The granting of preferential treatment to favored customers under the guise of the booking system has resulted in substantial discriminations in price among candy manufacturers purchasing glucose from respondents.

(b). In some instances respondents, after the expiration of the time during which such booking is permitted to other customers, have allowed favored customers to purchase at the price in effect before an increase; in other instances respondents have made deliveries of glucose to favored customers more than 30 days after the date of the increase at the price in effect before an increase was made; while requiring other customers to take delivery within the 30-day period or suffer cancellation of the undelivered portion of the order; in still other instances respondents have permitted favored customers who purchase in tank wagon quantities, and who have no trackage or storage facilities for the acceptance of railroad tank car deliveries, to purchase tank car lots at the price in effect before an advance and have delivered such purchases in tank wagon quantities over extended periods of time, thus giving such favored customers the benefit of prices lower than those in effect to other tank wagon purchasers following the increase in price. There have also been price differences created among respondents' customers by various combinations or modifications of the booking practices described.

(c). To illustrate some of the booking practices of respondents, they booked for E. J. Brach and Sons 27 tank cars of glucose on March 25, 1937, at \$3.04 per hundred-weight preceding a price advance to \$3.49 early in April, and a second price advance about the middle of May to \$3.59. Deliveries under this order were commenced on May



19, 1937, and completed on July 3, 1937, during all of which time respondents sold to other customers at base prices of \$3.49 and \$3.59 per hundredweight. On March 25, 1937, respondents booked 7 tank cars of glucose for the Crystal Pure Candy Company at a time when the base price was \$3.04 per hundredweight and delivered this glucose during April, May, and June when sales were made to other purchasers at base prices of \$3.49 and \$3.59. The Crystal Pure Candy Company has no facilities to accept delivery by tank car or in tank car quantities, and deliveries by respondents against the 7-tank-car booking were in fact made by tank wagon from respondents' general storage tanks at their Chicago filling station. Such deliveries were made from day to day as required by the purchaser, who was thus afforded the benefit of the \$3.04 price at a time when other tank wagon customers were buying upon a base price of \$3.54 and \$3.59.

Paragraph Seven: (a) Many of those who purchase glucose or corn syrup of like grade and quality from the respondents pursuant to the aforesaid pricing plan, container differentials, and booking practices are candy manufacturers located in various States of the United States and are competitively engaged among themselves and with others in the sale of candy to various customers, including wholesalers, chain stores, and retailers located in the various States of the United States. The glucose so purchased is used as an ingredient to some extent in the manufacture of most kinds of candy and is one of the major raw materials used in the production of many varieties of candy, constituting from about 5 to approximately 90 percent of the finished weight thereof. Generally, glucose is used in greatest proportion in candies which are sold by such manufacturers at prices of a few cents a pound and at narrow margins of profit. The higher prices paid for glucose purchased from respondents by candy manufacturers located in cities other than Chicago, Illinois, result to a greater or lesser degree in higher material costs to them than to manufacturers in Chicago who purchase from respondents, the degree in each instance depending upon the difference in price and the proportion of glucose in the particular candy manufactured. Some of such candy manufacturers who were located in cities other than Chicago before the construction and operation of respondents' plant in Kansas City, and some candy manufacturers formerly

located in such cities, have since 1922 relocated in Chicago. Those manufacturers who have purchased, and purchase, glucose from respondents in quantities smaller than a tank car and are charged prices established pursuant to the aforesaid container differentials have higher material costs for glucose than do those candy manufacturers who purchase from respondents in tank car quantities. Those manufacturers who purchase glucose from respondents and do not receive preferential treatment under the booking practices of respondents also have higher material costs for glucose than do those manufacturers who purchase from respondents and receive such preferential treatment.

38 (b) As to candies priced at but a few cents a pound and bearing no differentiating name or brand, candy manufacturers may attract customers by selling such candies at only a small fraction of a cent per pound lower than a competitor's price. This is especially true in selling such candies to chain stores and other purchasers of large quantities of candy to whom a small difference is determinative in the placing of their business. Under such circumstances candy manufacturers paying higher prices for glucose than competitors may attempt to recover such increased costs by increasing the price of such candy, or may make only selected sales on a non-price or other basis. The result in either case is to reduce profit. This result may occur either directly through the absorption by the manufacturer of higher syrup costs in the sale of candies at competitive prices or indirectly through a reduced volume of sales, or the result may be to diminish the ability of those paying the higher prices to compete with those paying the lower prices. These results may be avoided or augmented by differences in the costs to such candy manufacturers of other factors, such as labor, taxes, rents, insurance, other ingredients, proximity to markets, and delivery of the finished candies, no matter how such differences are brought about.

Paragraph Eight: (a) As a by-product of their corn refining, respondents produce and sell gluten feed and meal to the amount of more than 250,000 tons annually, which is approximately 40 to 50 percent of all such products used in the United States. Respondents sell and ship such products to approximately 3,000 different purchasers located in various states of the United States. Gluten feed and meal

compete with similar products produced and sold by the aforesaid corn refining competitors of respondents, and also compete with other types of feed produced by distillers, cottonseed mills, wheat flour mills, and soy bean crushers. Respondents sell such feed and meal produced at their Pekin and Argo plants on the basis of a gross price for delivery in Chicago plus freight from Chicago to any other destination. The gluten feed and meal produced by respondents at their Kansas City plant are sold at a bulk price for delivery in Kansas City plus freight from Kansas City to any other destination. While selling to the majority of their customers at prices arrived at in the manner set out above, respondents have, over a period of years, discriminated in favor of at least six purchasers of such products by means of discounts, commissions, rebates, refunds, or allowances. The purchasers so favored were, and are: Allied Mills, Inc., Chicago, Illinois; Cooperative G. L. F. Mills, Inc., Buffalo, New York; E. W. Bailey and Company, Montpelier, Vermont; Jesse C. Stewart and Company, Pittsburgh, Pennsylvania; Marshfield Milling Company, Marshfield, Wisconsin; and Farley Feed Company, Janesville, Wisconsin.

(b) Pursuant to various contracts and agreements respondents have, since June 19, 1936, sold Buffalo corn gluten feed and Diamond corn gluten meal to Cooperative G. L. F. Mills, Inc., in the following amounts at respondents' regular prices:

Date	Feed (in tons)	Meal (in tons)
June 19-Dec. 31, 1936	29,917½	2,070
1937	40,474½	770
1938	36,078	1,221
1939	58,652	2,796

By the contracts and agreements under which these sales were made respondents agreed to pay to Cooperative G. L. F. Mills, Inc., an allowance of 50c per ton from their regular market prices on sales and shipments of such feed and meal in quantities of from 1,500 to 2,499 tons per month, and an allowance of 65c per ton on feed and meal on monthly shipments in excess of 2,500 tons. Respondents have paid to Cooperative G. L. F. Mills, Inc. substantial sums of money pursuant to such agreements. Cooperative G. L. F. Mills, Inc., has resold the corn gluten

feed and meal purchased from respondents, both unmixed and as ingredients in prepared, mixed, or branded feeds of its own, to authorized agents, buyers, and retail stores owned or controlled by it in the States of New York, New Jersey and Pennsylvania. Respondents have, since June 19, 1936, sold corn gluten feed and meal products of like grade and quality in substantial quantities at their full market price without discount, allowance, commission, rebate, or other compensation to dealers in such products and feed mixers located in and doing business in New York, New Jersey, and Pennsylvania. Such dealers and feed mixers were, and are, in direct competition with Cooperative G. L. F. Mills, Inc., in the resale of respondents' products unmixed or as substantial and essential ingredients in prepared, mixed, or branded feed products.

(c) Pursuant to certain contracts or agreements, respondents have, since June 19, 1936, sold to Allied Mills, Inc., Buffalo corn gluten feed and Diamond corn gluten meal in the following amounts at respondents' regular market prices for such products:

Date	Feed (in tons)	Meal (in tons)
June 19-Dec. 31, 1936	6,623	1,702
1937	11,446	2,252
1938	8,903	6,684½
1939	9,013	5,143½

Under said contracts and agreements respondents agreed to pay to Allied Mills, Inc., an allowance of 50¢ per ton from their regular market prices for such products on sales and shipments of feed and meal of not less than 1,200 tons per month, and as a result thereof respondents have paid to Allied Mills, Inc., substantial sums of money. Allied Mills, Inc., has resold the said products purchased from respondents, both unmixed and as ingredients in prepared, mixed, or branded feeds of its own, to feed dealers in 31 States of the United States. Respondents have, since June 19, 1936, sold similar products of like grade and quality in substantial quantities at their regular market prices without discount, allowance, commission, rebate, or other compensation to dealers in these products and feed mixers located in and doing business in a substantial number of the 31 States above referred to, and said dealers and feed mixers were, and are, in direct competition with Allied

Mills, Inc., in the resale of these products unmixed or as substantial and essential ingredients in prepared, mixed, or branded feed products.

(d) Pursuant to an understanding and agreement respondents have, since June 19, 1936, sold to E. W. Bailey and Company of Montpelier, Vermont, Buffalo corn gluten feed and Diamond corn gluten meal in the following amounts at their regularly established market prices:

40 Date	Feed (in tons)	Meal (in tons)
June 19-Dec. 31, 1936	290	—
1937	1,548½	110½
1938	2,175	146
1939	1,968	141

As a result of said understanding and agreement respondents have paid E. W. Bailey and Company an allowance on said purchases at the rate of 50¢ per ton. E. W. Bailey and Company has resold such products, both unmixed and as ingredients in prepared, mixed, or branded feeds of its own, to feed dealers in the States of Vermont, New Hampshire, Massachusetts, and New York. Respondents have, since June 19, 1936, sold their aforesaid products of like grade and quality in substantial quantities at their regular market prices without any discount, allowance, commission, rebate, or other compensation to dealers in such products and feed mixers located and doing business in the States of Vermont, New Hampshire, Massachusetts, and New York, and said dealers and feed mixers are in direct competition with E. W. Bailey and Company in the resale of said products unmixed or as a substantial and essential ingredient in prepared, mixed, or branded feed products.

(e) Pursuant to an understanding and agreement respondents have, since June 19, 1936, sold to Jesse C. Stewart and Company of Pittsburgh, Pennsylvania, Buffalo corn gluten feed and Diamond corn gluten meal in the following amounts at their regular market prices:

Date	Feed (in tons)	Meal (in tons)
June 19-Dec. 31, 1936	240	90
1937	840	170
1938	990	160
1939	915	175



As a result of said agreement and understanding, respondents have paid to Jesse C. Stewart and Company an allowance of 50¢ per ton on such products resold unmixed. Jesse C. Stewart and Company has resold said products purchased from respondents, unmixed, to feed dealers in the State of Pennsylvania and in the area immediately surrounding Pittsburgh, Pennsylvania. Respondents have, since June 19, 1936, sold their said products of like grade and quality in substantial quantities at their regular market prices therefor without discount, allowance, commission, rebate, or other compensation to dealers in such products located in and doing business in Pennsylvania and in the area immediately surrounding Pittsburgh, Pennsylvania, and who are in direct competition with Jesse C. Stewart and Company in the resale of such products.

(f) Pursuant to an understanding and agreement respondents have, since June 19, 1936, sold to Marshfield Milling Company of Marshfield, Wisconsin, Buffalo corn gluten feed and Diamond corn gluten meal in the following amounts at their regular market prices therefor:

41. Date	Feed (in tons)	Meal (in tons)
June 19-Dec. 31, 1936	155	165
1937	341	141
1938	157	120
1939	180	50

As a result of said agreement and understanding respondents have paid to the Marshfield Milling Company allowances at the rate of 50¢ per ton on said products resold unmixed, and said purchaser has resold these products, unmixed, to feed dealers in the State of Wisconsin. Respondents have, since June 19, 1936, sold their aforesaid products in substantial quantities at their regular market prices therefor without discount, allowance, commission, rebate, or other compensation to dealers in such products located in and doing business in the State of Wisconsin and who are in direct competition with Marshfield Milling Company in the resale of said products.

(g) Pursuant to an understanding and agreement, respondents have, since June 19, 1936, sold to Farley Feed Company, Janesville, Wisconsin, Buffalo corn gluten feed

and Diamond corn gluten meal in the following amounts at their regular market prices therefor:

Date	Feed (in tons)	Meal (in tons)
June 19-Dec. 31, 1936	10	10
1937	93	73
1938	50	70
1939	69½	68½

As a result of said agreement and understanding, respondents have paid to the Farley Feed Company allowances at the rate of 50¢ per ton on said products resold unmixed, and said company has resold these products, unmixed, to feed dealers in the State of Wisconsin. Respondents have, since June 19, 1936, sold their aforesaid products in substantial quantities at their regular market prices therefor without discount, allowance, commission, rebate, or other compensation to dealers in such products located in and doing business in the State of Wisconsin who are in direct competition with Farley Feed Company in the resale of said products.

(h) The allowances granted and paid by respondents to the aforesaid Cooperative G. L. F. Mills, Inc., Allied Mills, Inc., E. W. Bailey and Company, Jesse C. Stewart and Company, Marshfield Milling Company, and Farley Feed Company are sufficient, if and when reflected in whole or in substantial part in resale prices, to attract business to Cooperative G. L. F. Mills, Inc., Allied Mills, Inc., E. W. Bailey and Company, Jesse C. Stewart and Company, Marshfield Milling Company, and Farley Feed Company away from their respective competitors, or to force said competitors to resell such feed and meal products purchased from respondents at a substantially reduced profit, or to refrain from reselling. The allowances thus paid by respondents to the favored customers are sufficient to substantially increase the respective margins of profit of such customers over and above the margins of profit otherwise obtainable in the resale of such feed and meal products. Respondents did not produce any evidence to show that the lower prices granted to the above-named favored purchasers of feed and meal products made no more than due allowance for differences, if any, in the cost of manufacture, sale, or delivery of their said feed and meal products resulting from the differing methods or

quantities, if any, in which such products were to said purchasers sold or delivered.

Paragraph Nine: (a) One of the principal products resulting from respondents' grinding and refining of corn is corn starch. Such corn starch is sold and distributed by respondents on a large scale throughout the United States. It is sold in many different forms varying in moisture content, viscosity, and in other ways. The form known as thick boiling pearl starch of 12 percent moisture is usually considered the basic form and is customarily used as a base to which the prices of other forms of starch are related.

(b) Since June 19, 1936, and up to the present time, respondents have sold and delivered substantial quantities, amounting to many millions of pounds, of starches and starch products to Keever Starch Company, Columbus, Ohio, hereafter referred to as Keever, and to Stein-Hall and Company of New York, New York, and to Stein-Hall Manufacturing Company of Chicago, Illinois, hereafter referred to as Stein-Hall, for use, consumption, and resale within the United States and in the District of Columbia. Respondents have also sold substantial quantities of starches and starch products of like grade and quality to individuals, firms, partnerships, and other corporations located in the several States of the United States and competitively engaged with Keever and Stein-Hall in the use, consumption, and resale of such products.

(c) The sales made by respondents to Keever and Stein-Hall were at prices which reflected a substantial discount, rebate, commission, or other allowance from respondents' regular market or list prices at the time of such sales. Respondents, during the same period of time, made sales to competitors of Keever and Stein-Hall at their market or list prices current at the time of such sales without any discount, rebate, commission, or other allowance. The discount, rebate, commission, or allowance granted to Keever and to Stein-Hall was, and is, sufficient to substantially increase their respective margins of profit over and above the margins of profit otherwise obtainable in the use, consumption, and resale of starches and starch products; and is sufficient, if and when reflected in whole or in substantial part in resale prices, to attract business to Keever and to Stein-Hall away from their competitors.

or to force such competitors to resell said starches and starch products at substantially reduced profit, or to refrain from reselling. The said discount, rebate, commission, or other allowance granted to Keever and to Stein-Hall may be sufficient to attract the business of such purchasers away from competitors of respondents, or to force said competitors to sell such starches and starch products at substantially reduced profit, or to refrain from selling. Respondents did not produce any evidence to show that the discount, rebate, commission, or other allowance granted by them to Keever and to Stein-Hall, respectively, made no more than due allowance for differences, if any, in the cost of manufacture, sale or delivery of their starches and starch products resulting from differing methods or quantities, if any, in which such products were to such purchasers sold or delivered.

Paragraph Ten: (a) Since about 1933 respondents have produced, sold, and distributed dextrose in dry, powdered form under the trade name "Cerelese" to the baking, soft drink, and canning industries, and for a shorter period of time to candy manufacturers. Glucose, or corn syrup unmixed, contains a substantial quantity of dextrose, but the product here under consideration is dry, powdered dextrose.

(b) In 1935 or 1936, respondents entered into negotiations with The Curtiss Candy Company of Chicago, 43 Illinois, for the purpose of inducing that company to use dry dextrose in its candies and to advertise them as containing dextrose. The Curtiss Candy Company has as wide distribution of its candies as any candy manufacturer in the United States and is an aggressive company which has, over a period of years, advertised its products approximately as much as all other candy manufacturers in the United States combined. Its advertising has appeared in newspapers, magazines, on billboards, stationery, envelopes, candy wrappers, cartons, and boxes, and on radio broadcasts. Prior to September 1936, The Curtiss Candy Company had purchased small quantities of dry dextrose from manufacturers other than respondents but prior to that date was not using such dextrose in its candies to any appreciable extent.

(c) After a year or more of experimentation and negotiation with respondents, The Curtiss Candy Company

undertook to use dry-dextrose in the manufacture of most of its candy products and to advertise the presence of dextrose in its candies and explain the nature of dextrose. It has, since September 1936, added to its advertising representations statements to the general effect that its candies are enriched by dextrose or rich in dextrose, that dextrose is a quick source of energy, and that it is energizing and aids in relieving fatigue, all for the purpose of inducing the purchase of its candies by members of the consuming public in order to get the benefit of the dextrose contained therein. By means of various advertising media The Curtiss Candy Company has advertised certain of its candy products in a manner of which the following is typical:

Is Rich in Pure  
**D E X T R O S E**  
 The Sugar  
 Your Body Uses  
*Directly* for Energy

### **RICH IN DEXTROSE**

**Step Out With Vigor!**

For pep and energy that take you to the end of the trail without tiring, carry these energy-food candies wherever you go. . . . That's because all four of these famous Curtiss candy bars are enriched with Dextrose—the sugar your body uses directly for energy.

The satisfying goodness of Baby Ruth is as natural as the pure foods combined to make this big delicious candy bar. Milk, butter, eggs, fine chocolate, plump crisp peanuts—and Dextrose, the sugar your body uses directly for energy—these are among the choice ingredients which give Baby Ruth its fine flavor, fresh fragrance and its real food value.

Yes, in every bar of fresh, fragrant Baby Ruth candy is an abundance of food energy. Deliciously blended in Baby Ruth are such natural foods as milk, butter, eggs, fine chocolate, top grade peanuts—and pure Dextrose, the sugar your



body uses directly for energy. Is it any wonder that millions agree "Baby Ruth is fine candy and fine food?"

44 And by radio announcements such as:

Wise parents insist upon their children eating Baby Ruth candy. It's pure, delicious and energizing because it's rich in Dextrose.

Lots of mothers have written us asking for more information about Dextrose, the energy sugar . . . and how it makes Baby Ruth candy so good for everyone. Well, it's simple to explain. Dextrose is a pure white sugar . . . which doctors call "body" or "muscle" sugar. It is the substance which makes your heart beat, your lungs breathe, your muscles move. Delicious Baby Ruth candy is so rich in Dextrose that it is more than just a fine pure candy. . . . Baby Ruth is a real energizing food.

(d) Pursuant to the negotiations with The Curtiss Candy Company but without any written contract with regard thereto, respondents, in consideration of the addition of the "dextrose message" to The Curtiss Candy Company's advertising, appropriated various sums of money which were paid to and expended by their advertising agency in the purchase of advertising in newspapers, magazines, and on the radio depicting Curtiss candy products as being "rich in Dextrose" or "enriched with Dextrose." Respondents were not obligated to expend any specific amount in advertising Curtiss candies, and the money actually expended was not paid to The Curtiss Candy Company but was paid to and expended by respondents' advertising agency in the aforesaid manner. Respondents have expended in advertising The Curtiss Candy Company products in the aforesaid manner approximately \$100,000 in 1936, \$250,000 in 1937, \$200,000 in 1938, and \$200,000 in 1939.

(e) Officials of The Curtiss Candy Company and of respondents testified that there was no agreement that Curtiss would purchase its requirements of dry dextrose from respondents. However, in testifying with regard to the arrangements made with The Curtiss Candy Company the vice-president in charge of sales for Corn Products Refin-

ing Company, who is also president of Corn Products Sales Company, referred to his belief that Curtiss would use 12,000,000 pounds of dextrose the first year, and when asked why he thought this would be the case, replied:

A. Because we knew what his volume was and we thought we could put a certain percentage of dextrose in that volume. And we were fooled.

Q. Well, it was to get that percentage of volume, that twelve million pounds from Curtiss that you entered into the advertising arrangements?

A. No, it wasn't. We entered into the advertising arrangement because we thought it was a first class advertising campaign for dextrose. The twelve million was just velvet, that's all.

Q. Why do you say you were fooled?

A. Well, because twelve million pounds is a nice amount of business to shoot at. But our main object was to—was to publicize dextrose.

(f) As a matter of fact, after the agreement with respondent The Curtiss Candy Company purchased the following amounts of dry dextrose from respondents and 45 made no purchases from any other source:

Date	Pounds
1936	1,347,357
1937	2,046,015
1938	3,386,433
1939	7,090,861

Curtiss also began purchasing glucose from respondents in 1938 but its purchasing agent testified that such purchases of glucose were not made pursuant to any understanding as to advertising. Glucose purchases by Curtiss during the four years mentioned were:

Date	Glucose from All Sources	Glucose from Respondents
1936	22,997,379	0
1937	22,746,549	0
1938	27,808,709	3,549,260
1939	24,712,254	14,609,138

(g) Respondents, during the time sales of dry dextrose were being made to The Curtiss Candy Company, also sold

and delivered substantial quantities of dry dextrose to other candy manufacturers located in various States of the United States who were, and are, competitors of The Curtiss Candy Company. However, respondents did not enter into any arrangement with any of such purchasers similar to the arrangement with The Curtiss Candy Company, or into any arrangement to supply services or facilities of any kind. As to substantially all, if not all, of these competing candy manufacturers no offer of any such arrangement on proportionately equal terms, or upon any terms whatever, was made. In fact, respondents since June 19, 1936, have instructed their salesmen to advise customers to whom they sell products to be used in the manufacture of confectionery that they do not contribute to the advertising done by customers. Respondents have not, during the time the aforesaid arrangements have been in effect with The Curtiss Candy Company, appropriated, turned over, or paid to their advertising agency, or to anyone else, any money with which advertising services were, or could be, purchased for the advertising of products of any purchaser of dry dextrose except The Curtiss Candy Company, and they have not furnished any advertising services or facilities, either similar or of any kind or character whatever, to their customers who purchase dry dextrose from them and who compete with The Curtiss Candy Company in the sale of candy containing dextrose.

(h) The Curtiss Candy Company used dextrose purchased from respondents in most of the candies it made and sold. The amount used varied in different products from a small percentage to as much as 90 percent of the weight of the candy. Such dextrose was mixed with other products, as indicated in subparagraph (c) of Paragraph Ten hereof, to produce the candy sold by Curtiss, and it constituted a substantial, and frequently a major, portion of the products advertised and sold by The Curtiss Candy Company.

Paragraph Eleven: (a) The Huron Milling Company of Harbor Beach, Michigan, and the Keever Starch Company, of Columbus, Ohio, are large purchasers of pearl starch and other starches and were each engaged in the grinding and refining of corn and manufacture of starch and starch products until 1927 in the case of the Huron Milling Company and until 1932 in the case of the Keever Starch Company.

46 (b) On April 21, 1927, respondents entered into a contract with the Huron Milling Company by which that company agreed to purchase from respondents its entire requirements of thin boiling pearl, chlorinated and other special starches, including Hercules gum, up to a maximum of 30,000,000 pounds annually, and to purchase from respondents its entire requirements of ordinary thick boiling pearl and powdered corn starches and edible pearl and powdered corn starches up to a maximum of 20,000,000 pounds annually. This contract was for a period of 15 years from the date of execution thereof, with provision for an extension of 10 years at the option of the buyer. On July 12, 1932, respondents entered into a contract with the Keever Starch Company whereby they agreed to sell and that company agreed to purchase from respondents its entire requirements of corn starch products up to a maximum of 20,000,000 pounds per annum. Said contract was for a term of 15 years from the date of execution thereof, with provision for an extension of 10 years at the option of the buyer.

(c) The prices at which said starches and starch products were contracted to be sold by respondents, and at which they have been sold to said purchasers in the course of interstate commerce, did, and do, approximate, or were, and are, below the cost at which said starches and starch products were then, and since could have been, manufactured by Huron Milling Company and Keever Starch Company. Said starches and starch products were sold by respondents for use, consumption, and resale within the United States, territories thereof, and the District of Columbia.

(d) Said contracts are, in fact, for the entire requirements of the Huron Milling Company and Keever Starch Company, respectively, and require for their performance that said purchasers refrain from using or dealing in starches and starch products manufactured by any competitor or competitors of respondents, and the parties to said contracts so understood the meaning of said contracts and the effect of the performance thereof. These contracts have been, and are being, faithfully performed by said purchasers, and in so doing they have refrained, and are refraining, from using or dealing in starches or starch products manufactured by any competitor or competitors of

respondents.) Although the purchasers reserve the right in said contracts to manufacture and sell starches and starch products produced from corn by the use of their own facilities, the prices charged them by respondents are so satisfactory to said purchasers that since the execution of said contracts said purchasers have wholly ceased the manufacture of starches and starch products from corn. At times and from time to time one or more competitors of respondents were, and have been, ready, willing, and able to supply some of said purchasers' requirements of such products.

(e) The effect of the execution and performance of said contracts, as aforesaid, may have been to substantially lessen competition between the respondents and their competitors and may have tended to create a monopoly in the respondents in the sale and distribution of starches of the type manufactured by respondents for such purchasers.

### CONCLUSION

The discriminations in price by respondents as hereinabove set forth have resulted, and do result, in substantial injury to their competitors, hinder, obstruct, and tend to suppress competition with respondents, and tend to create a monopoly in them in the processing and refining of corn and the sale of products and by-products of such processing and refining, and have resulted, and do result, in substantial injury to competition among purchasers of such products and by-products by affording material and unjustified price advantages to preferred purchasers and not to others, and violate subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by the Act of June 19, 1936 (Robinson-Patman Act). The acts of respondents as hereinabove set forth in furnishing or contributing to the furnishing of advertising services and facilities to one of their customers in the resale of dextrose purchased from them and not to competing customers purchasing said dextrose upon proportionally equal terms, or upon any terms whatever, violate subsection (c) of Section 2 of said Clayton Act as amended. The contracts with Huron Milling Company and Keever Starch Company providing that said companies



shall purchase their requirements of starch and starch products from respondents to the exclusion of respondents' competitors, and the acts and practices pursuant to said contracts, constitute violation by respondents of Section 3 of the aforesaid Clayton Act as amended.

By the Commission.

W. A. Ayres,  
*Chairman.*

(Seal)

Dated this 16th day of  
March, A. D. 1942.

Attest:

Otis B. Johnson,  
*Secretary.*

48 UNITED STATES OF AMERICA  
Before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 16th day of March, A. D. 1942.

Commissioners:

William A. Ayres, Chairman,  
Garland S. Ferguson,  
Charles H. March,  
Ewin L. Davis,  
Robert E. Freer.

(Caption—Docket No. 3633)

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondents, the amended complaint of the Commission and respondents' answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and oral arguments by counsel, and the Commission having made its findings as to the facts and its conclusion that respondents have violated subsections

(a) and (c) of Section 2 and Section 3 of "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, (Clayton Act) as amended by Act of June 19, 1936, (Robinson-Patman Act):

It Is Ordered that respondents Corn Products Refining Company, a corporation, and Corn Products Sales Company, Inc., a corporation, and their officers, directors, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of products resulting from the grinding and refining of corn in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

(1) Directly or indirectly discriminating in price between different purchasers of glucose or corn syrup unimixed of like grade and quality in the manner and degree set forth in Paragraphs Four and Five of the findings as to the facts herein, or in any manner or degree substantially similar thereto, or from continuing or resuming any such discriminations in price;

(2) Discriminating in price between purchasers of glucose or corn syrup unimixed by the methods set out in Paragraph Six of the findings as to the facts herein, or otherwise discriminating in price between purchasers by means of the booking or entry of orders for glucose or corn syrup unimixed, where the price differences between purchasers resulting therefrom substantially approximate or exceed those set forth in Paragraph Four or Five of the findings as to the facts herein, provided this shall not prohibit actual sales of glucose or corn syrup unimixed for future delivery which do not involve such discriminations in price at the time of actual sale;

49 (3) Directly or indirectly discriminating in price between different purchasers of starch or starch products of like grade and quality in the manner and degree set forth in Paragraph Nine of the findings as to the facts herein, or in any manner or degree substantially similar thereto, or from continuing or resuming any such discriminations in price;

(4) Directly or indirectly discriminating in price between different purchasers of corn gluten feed and

*Order to Cease and Desist.*

corn gluten meal of like grade and quality in the manner and degree set forth in Paragraph Eight of the findings as to the facts herein, or in any manner or degree substantially similar thereto, or from continuing or resuming any such discriminations in price;

(5) Furnishing advertising services to The Curtiss Candy Company as set forth in Paragraph Ten of the findings as to the facts herein, or directly or indirectly furnishing services or facilities to The Curtiss Candy Company or to any purchaser of dextrose or other of respondents' products in connection with the processing, handling, sale, or offering for sale thereof, when such services or facilities are not accorded to all competing purchasers of any such product on proportionally equal terms;

(6) Contracting to sell to, or selling to, the Huron Milling Company, the Keever Starch Company, or any other customer buying in quantities approximating those of the purchasers named, corn starch or other starch products, or fixing a price therefor or discount or rebate therefrom, on the condition, agreement, or understanding that any such purchaser shall not use or deal in corn starch or other starch products of a competitor or competitors of respondents, or from performing, enforcing, or continuing in operation or effect any such condition, agreement, or understanding.

It Is Further Ordered that respondents shall, within sixty (60) days after the service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

(Seal)

Otis B. Johnson  
Secretary.

*Certificate of Secretary.*

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UNITED STATES OF AMERICA

Before Federal Trade Commission, ss:

(Caption—Docket No. 3633)

I, Otis B. Johnson, secretary of the Federal Trade Commission and official custodian of its records, do hereby certify that transmitted herewith is a full, true and complete transcript of proceedings had before the Federal Trade Commission in the above entitled matter, consisting of:

Part 1—Pleadings

Part 2—Testimony

Part 3—Exhibits (Commission 1 to 49 incl.)

Part 4—Exhibits (Commission 50 to 129 incl.)

Part 5—Exhibits (Commission 130 to 149 incl.)

Part 6—Exhibits (Commission 150 to 188 incl.)

and separate exhibit marked:

2-1

3633-1

That this transcript is certified to the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to the filing in said Court of a petition for review of an Order to Cease and Desist, dated March 16, 1942, entered by the Federal Trade Commission in the above indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 18th day of January, A. D. 1943.

Otis B. Johnson,

Otis B. Johnson,

*Secretary.*

(Seal)

1672      UNITED STATES CIRCUIT COURT OF APPEALS  
For the Seventh Circuit

Corn Products Refining Company, a corporation, and Corn Products Sales Company, a corporation,	}	<i>Petitioners.</i>
<i>against</i>		
Federal Trade Commission,		<i>Respondent.</i>

PETITION TO REVIEW AND SET ASIDE ORDER  
OF FEDERAL TRADE COMMISSION

*To the Honorable Judges of the United States Circuit  
Court of Appeals for the Seventh Circuit:*

Your petitioners, Corn Products Refining Company and Corn Products Sales Company, by their attorneys, bring this action under the provisions of Section 21 of Title 15 of the U. S. Code (15 U. S. C. A. § 21) to review and set aside an order of the Federal Trade Commission and respectfully show:

First: Petitioner Corn Products Refining Company is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business at 17 Battery Place, in the City and State of New York; petitioner Corn Products Sales Company is and at all times mentioned herein was a corporation organized and existing under and by virtue of the laws of New Jersey, with its principal office and place of business at 17 Battery Place, in the City and State of New York. Petitioner 1673 Corn Products Refining Company owns the entire capital stock of petitioner Corn Products Sales Company, and controls and directs Corn Products Sales Company. Petitioner Corn Products Refining Company owns and operates plants at various points including Argo, Illinois, in the Chicago switching limits, and sometimes referred to herein as Chicago, and also at North Kansas City, Missouri (hereafter referred to as Kansas City). Said petitioner is engaged in the manufacture and sale of products derived from corn, including corn syrup unmixed (or



glucose), dextrose, corn starch, corn gluten feed and corn gluten meal, and petitioner Corn Products Sales Company is engaged in the distribution and sale of such products. The products manufactured and sold by petitioners are sold to purchasers located in the State of Illinois and elsewhere throughout the United States of America.

Second: On the 21st day of October, 1938, respondent Federal Trade Commission in a proceeding entitled as follows:

*In the Matter of Corn Products Refining Company, Corn Products Sales Company, Inc., Docket No. 3633"*

issued its complaint against your petitioners, a copy of which, marked Exhibit A, is attached hereto.

It was recited in the complaint that the Commission issued the complaint having reason to believe that petitioners "have been and are now violating the provisions of Section 2(a)" of the Clayton Act, as amended by the Robinson-Patman Act.

It was then alleged in general language that since June 19, 1936, petitioners had been and were then discriminating in price between purchasers in that they had been and were selling their products

"to some purchasers at a higher price than the price at which commodities of like grade and quality are sold to other purchasers generally competitively engaged with the first mentioned purchasers."

1674 The only more specific allegations of the acts claimed to constitute the alleged discrimination in price were contained in Paragraph Six of the complaint reading:

"Paragraph Six: The aforesaid discriminations in price referred to in Paragraph Four are generally effected through the employment of delivered prices. The delivered prices charged buyers while identical in terms of dollars and cents as to those located at any given point of delivery, are discriminatory among buyers located at diverse points of delivery. The differences in price between buyers located at diverse points of delivery are often substantial."

Illustrations were given of petitioners' basing point method of arriving at their delivered prices of corn syrup

unmixed (glucose) at different destinations by adding to a Chicago price the freight rates from petitioners' Chicago plant to such destinations whether the sales were to be completed by shipment from there or by shipment from petitioners' Kansas City plant.

It was alleged that the effect of the claimed discriminations

"may be substantially to lessen competition in the sale and distribution of corn products between the said respondents and other manufacturers of corn products and also between the said buyers of said corn products receiving said lower discriminatory prices and other buyers not receiving said lower discriminatory prices; and the effect of said discriminations has been, or may be, to injure, destroy or prevent competition in the sale and distribution of corn products between the said respondents and other manufacturers of corn products; and the effect of said discriminations has been, or may be, to injure, destroy and prevent competition in the lines of commerce in which those who purchase from respondents are engaged between the said beneficiaries of said discriminatory prices and said buyers who do not and have not received such beneficial prices."

1675 Third: Thereafter your petitioners filed their answer to the said complaint, a copy of which is attached hereto as Exhibit B. By this answer your petitioners alleged that the delivered prices charged by them for the same commodity similarly packed and shipped were identical as to all buyers located at a given point of delivery, admitted that they had been and were selling products derived from corn to purchasers at some destinations at higher delivered prices than the delivered prices at which products of like grade and quality derived from corn were sold to other purchasers located at other destinations but denied that this constituted discrimination in price within the prohibition of Section 2 of said Clayton Act, as amended by said Robinson-Patman Act. Further answering said complaint, your petitioners alleged that the manufacture and sale of products derived from corn is a private business not dedicated to the public use and not affected with the public interest, and if Section 2 of the Clayton Act, as amended, is construed to render unlawful the price dif-

ferentials charged by your petitioners, it would constitute an unlawful attempt to fix or regulate prices; that Section 2, as amended, forbids the doing of acts in terms so vague, indefinite and uncertain that it fails to inform petitioners what is lawful and what is unlawful and is a denial of due process of law, and that it attempts to delegate legislative powers to administrative officials and is therefore unconstitutional.

Fourth: Thereafter, in the months of December, 1938 and January, 1939, said Federal Trade Commission held hearings before a Trial Examiner appointed by it. At said hearings, over the objections of petitioners, counsel for the Commission were permitted by the Trial Examiner to and did ask officials of petitioners, called by the Commission as witnesses, questions as to matters not within the scope of or relevant to the issues raised by the allegations of the complaint, but designed to elicit, without prior notice to petitioners, whether or not other violations of the 1676 Clayton Act had been or were being committed by petitioners. The testimony taken at said hearings was reduced to writing and filed in the office of the said Federal Trade Commission.

Fifth: Thereafter respondent Federal Trade Commission issued its amended complaint against your petitioners, a copy of which is attached hereto as Exhibit C. Said amended complaint contained three counts. The first count of the said amended complaint alleged violation of Section 2(a) but did so only generally and as conclusions stated in the words of the Act, and specified no facts alleged to constitute such violation; the second count alleged a violation of Section 2(e) of said Act, namely, that petitioners entered into advertising arrangements with the Curtiss Candy Company of Chicago and the Bachman Chocolate Manufacturing Company of Mount Joy, Penn., referred to as purchasers of dextrose,

"as a result of which large sums of money have been spent by them (petitioners) since June 19, 1936 in cooperatively advertising with such purchasers the dextrose so purchased and the respondents (petitioners) have not accorded such services or facilities to other of their purchasers competitively engaged with the aforementioned purchasers on proportionately equal terms".

in violation of Section 2(e) of said Act. The third count alleged that petitioners sold large quantities of corn starch to the Keever Starch Company of Columbus, Ohio, and the Huron Milling Company of Harbor Beach, Michigan, under contracts fixing the price charged on the condition and agreement that the purchasers should not use the goods of a competitor of petitioners, and that these acts tended to create a monopoly in petitioners in the sale and distribution of corn starch in commerce and were in violation of Section 3 of said Act.

1677      Sixth: Thereafter your petitioners filed their answer to said amended complaint, a copy of which is hereto attached as Exhibit D. As an answer to the first count petitioners set up substantially the same defenses as were set forth in their answer to the original complaint. As an answer to the second count, petitioners admitted that they had entered into arrangements with the Curtiss Candy Company and the Bachman Chocolate Manufacturing Company as a result of which sums of money had been expended by petitioners since June 19, 1936 in advertising dextrose, one of petitioners' commodities, cooperatively with the advertising by the Curtiss Candy Company and the Bachman Chocolate Manufacturing Company of the products of said companies, but petitioners denied the other allegations contained in said second count. As an answer to the third count, petitioners admitted the execution of contracts between Corn Products Refining Company on the one hand, and Huron Milling Company and Keever Starch Company respectively on the other hand, and the manufacture by petitioners thereunder of certain grades or kinds of starch for said two companies up to specified maximum annual quantities but denied any knowledge as to whether starch so manufactured was intended for use, consumption or resale within the United States and further denied all other allegations contained in said third count. As a separate defense, it was again alleged in the answer to the said amended complaint that the manufacture and sale of products derived from corn is a private business and is not dedicated to the public use and not affected with the public interest, and that if Section 2 of the Clayton Act, as amended, be construed to render unlawful such differences in prices or such discounts as are from time to time made by petitioners or such cooperative advertising arrangements as have been

made by petitioners, it would represent an attempt to fix or regulate prices or to regulate the conduct of a private business, which would constitute a taking of the private property of petitioners for a public use without compensation and would be beyond the authority of the Congress under the Commerce Clause of the Constitution; that Section 2 of said Act, as amended, forbids the doing of acts in terms so vague, indefinite and uncertain that it fails to inform petitioners what is lawful and what is unlawful and therefore its attempted enforcement constitutes a denial of due process of law; that said Section 2 represents an attempted delegation of legislative power to administrative officials, and that for all these reasons Section 2 is unconstitutional and null and void.

Seventh: Thereafter, said Federal Trade Commission held hearings at New York and Chicago before Trial Examiners appointed by it, at which hearings counsel for the Commission examined various witnesses called by them to testify. In addition to the testimony of such witnesses, various exhibits were offered and received in evidence, and various stipulations of fact were entered into between counsel for the Commission and counsel for petitioners, and were included in and made a part of the evidence before the Commission in lieu of the testimony of witnesses. The testimony taken at such hearings and the stipulations were reduced to writing and filed in the office of the Commission and, together with the exhibits and the testimony taken and the exhibits received at the earlier hearings, constitute all of the evidence before the Commission in the proceeding.

Eighth: Thereafter, the preparation and filing of any report by the Trial Examiner having been waived by counsel for your petitioners and counsel for said Federal Trade Commission, briefs were filed with the Commission in said proceeding by the attorneys for the Federal Trade Commission and by the attorneys for your petitioners; and thereafter the cause came on for oral argument before said Commission and following such argument was taken under submission by the said Commission.

Ninth: Thereafter, on the 16th day of March, 1949, said Commission issued in said proceeding a purported 1679 "Findings as to the Facts and Conclusion" together with a purported "Order to Cease and Desist", copies



of which are attached hereto as Exhibits E and F, respectively.

Tenth: The said "Findings as to the Facts" of the Commission are, in material and controlling respects, without substantial support in the evidence before the Commission in said proceeding and are contrary to said evidence; the said "Conclusion" of the Commission is not supported by the findings or by the evidence before the Commission and was based on and involved errors of law as to the meaning and effect of the several provisions of the statute alleged to be violated; and the order entitled "Order to Cease and Desist" made by the Commission pursuant to said "Findings as to the Facts and Conclusion" is not supported by the record before the Commission or by the Commission's findings, is based upon errors of law and is beyond the authority and jurisdiction of the Commission; all as more particularly hereinafter set forth.

Eleventh: For convenience, the various matters dealt with in the Commission's findings and conclusion and to which the portions of its order here in issue are addressed may be separately described as follows:

(a) Petitioners' practice of determining their delivered price for corn syrup unmixed (glucose) in tank cars at any destination by adding to their Chicago price the railroad freight rate from Chicago to such destination, whether or not shipment to fulfill any particular contract of sale to a buyer at such destination should be made from petitioners' Chicago plant (Argo) or from their plant at Kansas City, petitioners' practice in this regard being the so-called "Basing Point" method of determining delivered prices.

(b) Petitioners' practice of determining delivered prices for corn syrup unmixed (glucose) delivered at any destination in quantities less than a tank car load by adding to the tank car delivered price certain differentials, depending upon the character of the smaller containers used; for example, tank trucks, barrels, kegs, drums, etc.

(c) Petitioners' actions at certain times in the past when an increase in price has been announced of booking or entering orders for corn syrup from customers at the former price more than five days after the price

change, or of making deliveries to customers at the lower price more than thirty days after the booking of their orders.

(d) Petitioners' action at certain times in selling corn syrup in tank car lots to customers having no side-track facilities for the unloading of tank cars, handling such corn syrup through petitioners' filling station in Chicago and making delivery to such customers by tank wagon; the customers being charged, however, at the tank wagon prices as of the dates of the orders.

(e) Petitioners' sales of feed to various feed manufacturers under contracts providing for the granting to such purchasers of discounts or allowances.

(f) Petitioners' sales of Starch to Kever Starch Company and Stein-Hall Company under contracts providing for certain discounts, commissions or allowances.

(g) Petitioners' arrangement with the Curtiss Candy Company pursuant to which petitioners advertised dextrose manufactured by them cooperatively with Curtiss Candy Company's advertisement of its candies as containing dextrose.

Twelfth: The Commission's conclusion that petitioners' practice described in paragraph (a) of the foregoing Article Eleventh hereof was and is unlawful in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, and its order directing petitioners to cease 1681 and desist from such practice were and are erroneous as a matter of law, are not supported by proper findings, are without support in and contrary to the evidence before the Commission and should be set aside and annulled for the following reasons, among others:

(a) The Commission erred, as a matter of law, in finding and concluding that differences in the delivered prices at which petitioners' corn syrup has been and is sold at different destinations pursuant to said practice, such prices being arrived at by the so-called "Basing Point" method, constituted and constitute discrimination in price within the prohibitions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

(b) The findings of the Commission set forth in Paragraphs Four and Seven of the Commission's Findings as to the Facts do not support the Commission's conclusion that the differences in delivered prices to buyers at different destinations produced by petitioners' "basing point" practice

"have resulted, and do result, in substantial injury to their (petitioners') competitors, hinder, obstruct, and tend to suppress competition with respondents, and tend to create a monopoly in them in the processing and refining of corn and the sale of products and by-products of such processing and refining, and have resulted, and do result, in substantial injury to competition among purchasers of such products and by-products";

and do not support a conclusion that such differences in delivered prices have had or will have the effects or any of them specified in Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, whose existence is necessary for a violation thereof.

(c) The findings of fact set forth in sub-paragraphs (b) and (d) of Paragraph Four and in Paragraph Seven of the Commission's Findings as to the Facts and the conclusion quoted in the foregoing paragraph (b) are, with respect to petitioners' practice 1682 described in paragraph (a) of Article Eleventh hereof, without support in and contrary to the evidence before the Commission and there was no evidence before the Commission to support a conclusion that said practice or the resulting differences in delivered prices at different destinations have had or will have the effects specified in Section 2(a) as essential to a violation thereof.

(d) The Commission's conclusion that such practice and the resulting price differences at different destinations

"have resulted, and do result, in substantial injury to competition among purchasers of such products and by-products by affording material and unjustified price advantages to preferred purchasers and not to others,"

and that consequently there was and is a violation of Section 2(a), is erroneous as a matter of law, in that

there is no finding and no evidence to support a finding that any purchaser receiving such alleged "material and unjustified price advantages" did so knowingly or "knowingly receives the benefit of such discrimination", and such knowledge on the part of a purchaser is essential to a violation of said Section 2(a).

(c) The Commission's conclusion that said basing point practice and the resulting price differences

"have resulted, and do result, in substantial injury to their (petitioners') competitors, hinder, obstruct, and tend to suppress competition with respondents (petitioners), and tend to create a monopoly in them in the processing and refining of corn and the sale of products and by-products of such processing and refining"

is without support in and is contrary to the evidence before the Commission; and is arbitrary and wholly incompatible with the fact that as to some of petitioners' competitors the Commission has made substantially similar findings or conclusions in similar proceedings in which they were respondents; for example:

*In the Matter of The Hubinger Company, Docket No. 3801, decided April 3, 1941.*

For it is impossible and a complete negation of terms that the basing point pricing method tends to create a monopoly in each of several members of the industry who are found by the Commission to be competitive.

Thirteenth: The Commission's findings and conclusion that petitioners' so-called container differentials described in sub-paragraph (b) of Article Eleventh hereof were unlawful in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, were and are erroneous as a matter of law and contrary to and without support in the evidence, for the same reasons, among others, as are stated in foregoing Article Twelfth hereof, and for the further reason that there is no evidence whatever before the Commission as to what purchasers, if any, of corn syrup from petitioners made their purchases in one form of container rather than in another, or that there was any competition, or the extent of any competition, between pur-

chasers of corn syrup in one form of container and purchasers of corn syrup in another container or as to the effect of the prices charged upon competition, if any, between such purchasers.

Fourteenth: The Commission's conclusion that petitioners' actions described in paragraph (c) of Article Eleventh hereof were unlawful in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, was erroneous as a matter of law and without support in and contrary to the evidence before the Commission for the following reasons, among others:

(a) The Commission erred, as a matter of law, in finding and concluding that the differences between 1684 the prices paid by purchasers whose orders were booked by petitioners more than five days after a change in price or by purchasers to whom delivery was made more than thirty days after the booking of orders as compared with prices paid by other purchasers, if any, constituted discrimination in price within the prohibition of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

(b) The Commission's findings and conclusion that petitioners' practices described in paragraph (c) of Article Eleventh were in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, were arbitrary and contrary to and without support in the evidence, in that there was no evidence whatever before the Commission of any sales by petitioners to purchasers to whom similar privileges were not accorded; there was no evidence as to competition between purchasers from petitioners receiving such privileges and other purchasers, if any; there was no evidence as to the effect upon such competition, if any, of any differences in prices to purchasers which may have resulted from petitioners' practices above described; and there was no evidence that a purchaser, if any, receiving the benefit of the alleged preference did so knowingly.

Fifteenth: With respect to petitioners' action described in paragraph (d) of Article Eleventh, of selling corn syrup in tank car lots to customers having no side-track facilities for unloading tank cars, the Commission's findings and conclusion that such action was unlawful in violation of Sec-



tion 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, were and are similarly erroneous as a matter of law, were not supported by necessary findings, and were arbitrary and without support in and contrary to the evidence for the following reasons, among others:

(a) There was no evidence before the Commission that if such action did result in any differences in 1685 prices or discrimination between purchasers from petitioners, such purchasers were in competition with each other or that the alleged discrimination had any of the effects specified in the Act as essential to a violation thereof.

(b) The Commission erred and its findings were arbitrary and contrary to the evidence in that the Commission failed to find, as shown by the uncontradicted evidence, that petitioners sold or offered to sell corn syrup in tank car lots to all customers in the Chicago area customarily taking tank wagon delivery, and that there was no discrimination in this regard among such customers.

(c) If there were any evidence as to sales by petitioners to competing purchasers at the times in question, such evidence showed that the purchasers to whom delivery was made in tank wagons paid the tank wagon prices and therefore received no preferences or discrimination in price as compared with purchasers to whom delivery was made in tank cars and who paid the basic tank car prices.

Sixteenth: With respect to petitioners' action described in both paragraphs (c) and (d) of Article Eleventh, the Commission's Findings as to the Facts and Conclusion were and are arbitrary and contrary to and without support in the evidence before the Commission in that the Commission, in Paragraph Seven of its Findings as to the Facts, has found certain facts as though they related to petitioners' actions described in said paragraphs (c) and (d), whereas the only evidence in the record with respect to any of the facts found in said Paragraph Seven, was contained in the stipulation made a part of the record at the hearing on October 1, 1940, and by such stipulation the facts therein contained were stipulated solely in connection with differences in prices resulting from petitioners' basing point pricing practice and their container differentials so-called;

they were not stipulated as facts with reference to differences in price, if any, resulting from alleged delayed bookings, delayed deliveries or sales in tank car quantities to tank wagon customers.

Seventeenth: The Commission's findings and conclusion that petitioners' action, described in paragraph (e) of Article Eleventh hereof of granting discounts and allowances to various feed manufacturers or sellers was unlawful and resulted in discriminations in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, were and are in error as a matter of law and contrary to and without support in the evidence and without support in the findings made by the Commission for the following reasons, among others:

(a) The facts found in sub-paragraphs (a) to (h) inclusive of Paragraph Eight of the Findings as to the Facts, do not constitute or support a conclusion that the effects of the alleged discrimination, if any, were such as specified in the Act as essential to a violation thereof, and there was no evidence to support such a conclusion.

(b) The Commission erred in failing to find, in connection with the findings stated in Paragraph Eight (h), that there is no evidence whatever that the allowances paid to Cooperative G. L. F. Mills, Inc., Allied Mills, Inc., E. W. Bailey & Company, Jesse C. Stewart & Company, Marshfield Milling Company and Farley Feed Company, or any of them, have ever been reflected in whole or in substantial part in their resale prices, or have ever operated to attract business to them and away from their respective competitors, or to force such competitors to resell products purchased from petitioners at substantially reduced profit or to refrain from reselling.

Eighteenth: The Commission's findings and conclusion with respect to petitioners' action described in paragraph (f) of Article Eleventh hereof, in connection with sales of starch to Keever Starch Company and Stein-Hall Company were and are in error as a matter of law and contrary to and without support in the evidence and without support in the findings made by the Commission for the following reasons, among others:

(a) The findings of the facts in sub-paragraphs (a) to (c) inclusive of Paragraph Nine of the Findings

as to the Facts do not constitute or support a conclusion that the effects of the alleged discrimination, if any, were such as are specified in the Act as essential to a violation thereof and there was no evidence to support such a conclusion.

(b) The Commission erred in failing to find in connection with the facts found in Paragraph Nine (c) that there is no evidence that the discount, rebate, commission or allowances granted to Keever and to Stein-Hall were ever reflected in whole or in substantial part in their resale prices, or that they thereby ever attracted business from their competitors or forced such competitors to resell starches and starch products purchased from petitioners at a substantially reduced profit or to refrain from reselling.

(c) The Commission erred in failing to find further that there is no evidence that the said discount, rebate or other allowance ever has attracted the business of Keever and Stein-Hall away from competitors of petitioners or forced such competitors to sell at substantially reduced profit or to refrain from selling.

Nineteenth: The Commission's findings and conclusion with respect to the arrangement with the Curtiss Candy Company described in paragraph (g) of Article Eleventh hereof, pursuant to which petitioners advertised dextrose manufactured and sold by them cooperatively with Curtiss Candy Company's advertisement of its candies as containing dextrose, were and are in error as a matter of law, and the Commission's conclusion that said arrangement violated Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, was and is in error as a matter of law and contrary to and without support in the evidence and without support in findings necessary for the conclusion in the following respects, among others:

(a) The Commission erred as a matter of law in deciding that the arrangement with the Curtiss Candy Company, under which petitioners purchased advertising for themselves, constituted the furnishing to the Curtiss Candy Company of any services or facilities connected with the processing, handling, sale, or offering for sale of any commodity purchased by the Curtiss Candy Company from petitioners, within the meaning of Section 2(e).

(b) The findings of fact contained in Paragraph Ten of the Commission's Findings as to the Facts do not support the conclusion that Section 2(c) was violated in that there is no finding, and no evidence to support a finding, that the arrangement with the Curtiss Candy Company related to "a commodity bought for resale with or without processing" within the language and intent of said Section 2(c).

(c) If it was the Commission's finding and conclusion that the arrangement was with the Curtiss Candy Company as a purchaser "of a commodity bought for resale, with or without processing", such finding and conclusion were arbitrary, and contrary to the evidence in that

(1) The evidence showed that the arrangement was not related to or did not involve any purchase of dextrose by the Curtiss Candy Company from petitioners and was not made with the Curtiss Candy Company as a "purchaser of a commodity bought for resale";

(2) The evidence showed without contradiction that the Curtiss Candy Company manufactured and sold candy, not dextrose; that if it bought any dextrose it was for use only as an ingredient in the manufacture of candy, and it did not purchase dextrose for resale; and that even if the arrangement was related to the purchase of dextrose by the Curtiss Candy Company from petitioners, it was still not with a purchaser of a commodity bought for resale, either with or without processing.

(d) The Commission erred in failing to find in Paragraph Ten, as required by the evidence, that there is no evidence that petitioners have ever refused to enter into an arrangement similar to the Curtiss arrangement with any other candy manufacturer or any competitor of the Curtiss Candy Company desiring so to do.

(e) The Commission erred in failing to find, as required by the uncontradicted evidence, that petitioners have been ready and willing to enter into a similar arrangement with any other candy manufacturer similarly situated and engaged in similar advertising, and

have actually endeavored to have certain other manufacturers enter into similar arrangements, and such manufacturers have refused.

(f) The Commission has made no finding, and on the evidence could make no finding, essential to the conclusion reached, as to any other purchaser of dextrose from petitioners, or that there was any other purchaser or who such other purchaser was, or as to any competitor of the Curtiss Candy Company, against whom petitioners discriminated in violation of Section 2(e), or as to the identity of any other purchaser, if any, to whom petitioners failed to accord, on proportionally equal terms, any services or facilities in the processing, handling, sale or offering for resale of dextrose, which they accorded to the Curtiss Candy Company.

Wherefore, your petitioners pray this Court to review the said Findings of Fact and Conclusion of the Federal Trade Commission (Exhibit E attached hereto), and to 1690 review and set aside said "Order to Cease and Desist", dated March 16, 1942 (Exhibit F attached hereto).

Dated: September 21, 1942.

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25 Broadway,  
New York, N. Y.,  
*Of Counsel.*



1691

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

Corn Products Refining Company, a corporation, and Corn Products Sales Company, a corporation,

*Petitioners,*

No. 8116

*v.*

Federal Trade Commission,

*Respondent.*

ON PETITION TO REVIEW AND SET ASIDE AN ORDER  
OF THE FEDERAL TRADE COMMISSION

CROSS PETITION BY FEDERAL TRADE  
COMMISSION

*To the Honorable United States Circuit Court of Appeals  
for the Seventh Circuit:*

Comes now the Federal Trade Commission, respondent herein, and files this its cross petition against Corn Products Refining Company and Corn Products Sales Company, petitioners, and respectfully shows unto the Court that:

(1) On September 24, 1942, the petitioners filed herein their petition praying this Court to review and set aside a certain order to cease and desist issued by the respondent on March 16, 1942, in the Matter of Corn Products Refining Company, Corn Products Sales Company, Inc., Federal Trade Commission Docket No. 3633. Said order required the petitioners to cease and desist from engaging in certain conduct and practices, therein specified, found by respondent to be in violation of Subsections (a) and (c) of Section 2 and Section 3 of an Act of Congress approved October 15, 1914, entitled "An Act To supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the 1692 Clayton Act, as amended by an Act of Congress approved June 19, 1936, entitled "An Act To amend

Section 2 of the Act entitled 'An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., Title 15, Sec. 13), and for other purposes." (38 Stat. 731; 15 U. S. C. A. Sec. 14; 49 Stat. 1526, 1527; 15 U. S. C. A. Sec. 13).

(2) Said order to cease and desist was duly served upon petitioners on March 17, 1942, since which time said order has been and is now in full force and effect

(3) Respondent has certified and filed with the Court herein a transcript of the entire record of the proceeding in which said order to cease and desist was entered. Such proceeding was had in compliance with and in due conformity to all provisions of law, and the findings as to the facts, conclusion, and order to cease and desist made and entered therein by the respondent are valid.

(4) Petitioners have failed, neglected and refused to obey the said order to cease and desist.

WHEREFORE, the Federal Trade Commission, respondent, prays that the Court do make and enter herein a decree affirming the said order to cease and desist and commanding Corn Products Refining Company and Corn Products Sales Company, petitioners, to obey the same and comply therewith.

Respectfully submitted,

Federal Trade Commission

By W. T. Kelley

W. T. Kelley, *Chief Counsel*

Joseph J. Smith Jr.

Joseph J. Smith Jr.

*Assistant Chief Counsel*

Washington, D. C.,  
February 16, 1943.

510 — *Petitioners' Designation of Portions  
of Record to be Printed.*

1693 UNITED STATES CIRCUIT COURT OF APPEALS  
For the Seventh Circuit  
• • (Caption—Docket No. 8116) • •

PETITIONERS' DESIGNATION OF PORTIONS  
OF RECORD TO BE PRINTED

Corn Products Refining Company and Corn Products  
Sales Company, petitioners herein, by their attorneys, here-  
by designate the following portions of the Transcript of  
Record filed herein to be printed:

1. Complaint and Respondents' Answer thereto.
2. Amended Complaint and Respondents' Answer there-  
to.
3. Commission's Findings as to the Facts and Conclu-  
sion.

4. Commission's Order to Cease and Desist.

5. Commission's Exhibits 12, 13, 14, 25, 26, 27, 28, 68,  
69, 75, 76, 77, 78, 79, 94, 95, 96, 97, 98, 99, 100, 101, 102,  
103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114,  
115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126,  
127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138,  
139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150,  
151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162,  
163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174,  
175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185,  
1694 186, 187 and 188.

6. The following portions of the Transcript of Testi-  
mony:

Page	Line		Page	Line
1	1	to	166	4
179	18	to	181	8
195	1	to	232	19
238	1	to	238	13
432	12	to	512	12
542	18	to	564	4
583	1	to	595	19
603	14	to	613	5

*Petitioners' Designation of Portions  
of Record to be Printed.*

511

Page	Line		Page	Line
622	9	to	629	2
646	23	to	660	23
665	2	to	702	9
711	9	to	767	10
770	22	to	803	17
807	16	to	857	17
860	21	to	865	20
881	7	to	977	21

Dated: February 10, 1943.

William S. Jameson,  
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New York, N. Y.  
*Of Counsel.*

IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
For the Seventh Circuit

\* \* (Caption—Docket No. 8116) \* \*

**RESPONDENT'S DESIGNATION OF PORTIONS  
OF TRANSCRIPT TO BE PRINTED**

Respondent, Federal Trade Commission, respectfully requests Kenneth J. Carrick, Esq., Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, to print as the record for review in this proceeding, in addition to petitioners' designation of portions of the record to be printed, the following:

- (1) This (Respondent's) designation.
- (2) Transcript of the testimony as follows:

From Page	line	to	Page	line
232	20		240	9
564	6		565	19
595	20		599	4
613	6		613	10
613	15		613	25
617	11		622	8
643	9		646	22
874	1		875	7

- (3) Exhibits:

1-A to 1-K, inclusive;  
5-A, 5-B, 5-C, 5-D;  
70-A, to 70-E, inclusive;  
73;  
74.

(Signed) W. T. KELLY  
W. T. KELLY  
Chief Counsel,  
Federal Trade Commission.

March 31, 1943.



1696 UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

(Caption—Docket No. 8116)

STIPULATION AS TO PRINTING OF EXHIBITS.

For the purpose of avoiding unnecessary expense and undue burdening of the printed record in the above-mentioned case, it is hereby stipulated by counsel for the respective parties hereto that, notwithstanding petitioners' designation heretofore filed, the following exhibits need not be printed in said printed record and may be treated as physical exhibits and may be withdrawn by counsel for both parties for use in preparing briefs being returned to the Clerk of the Court by counsel for each party when the brief on behalf of said party is filed:

Commission's Exhibits: 12, 13, 14, 68, 69, 75, 76, 77, 78, 79, 90, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 173, 174, 176, 177, 179, 180, 181, 184, 185, 186, 187 and 188.

It is further stipulated that said exhibits may be referred to by counsel in their briefs and may be presented to the Court upon the argument of the cause.

William S. Jameson

Parker McCollister

*Counsel for Petitioners.*

Walter B. Wooden

*Counsel for Respondent.*



UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, filed on the twenty-fifth day of May, 1943, in:

Cause No. 8116.

Corn Products Refining Company, a Corporation, and Corn Products Sales Company, a Corporation,  
*Petitioners,*

*vs.*

Federal Trade Commission,

*Respondent,*

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of this Chicago, this 4th day of October, A. D. 1944.

(Seal)

(signed) Kenneth J. Carrick  
*Clerk of the United States Circuit Court  
of Appeals for the Seventh Circuit.*



At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the seventh day of October, in the year of our Lord one thousand nine hundred and forty-one; and of our Independence, the one hundred and sixty-sixth.

Corn Products Refining Company,  
a Corporation, and Corn Prod-  
ucts Sales Company, a Corpora-  
tion,

*Petitioners,*

8116 *vs.*

Federal Trade Commission,

*Respondent.*

On Petition for Re-  
view of Order of  
the Federal Trade  
Commission.

And, to-wit: On the twenty-fourth day of September, 1942, there was filed in the office of the Clerk of this Court, a Petition for Review, which said Petition appears in the printed record but is not copied herein.

And on the same day, to-wit: On the twenty-fourth day of September, 1942, there was filed in the office of the Clerk of this Court, an Appearance of counsel for Petitioners, which said appearance is in the words and figures following, to-wit:



UNITED STATES CIRCUIT COURT OF APPEALS  
For the Seventh Circuit.

---

Cause No. 8116.

Corn Products Refining Company, *et al.*,

*vs.*

Federal Trade Commission.

The Clerk will enter our appearance as counsel for Petitioners.

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New York, N. Y.

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25 Broadway,  
New York, N. Y.

Endorsed: Filed September 24, 1942. Kenneth J. Carrick, Clerk.

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And afterwards, to-wit: On the twenty-eighth day of September, 1942, there was filed in the office of the Clerk of this Court, an appearance of counsel for Respondent, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

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Cause No. 8116.

Corn Products Refining Company, a corporation, *et al.*,  
*Petitioners,*  
*vs.*

Federal Trade Commission,  
*Respondent.*

The Clerk will enter my appearance as counsel for respondent.

Joseph J. Smith, Jr.,  
*Assistant Chief Counsel,*  
Federal Trade Commission,  
Washington, D. C.

Endorsed: Filed September 28, 1942. Kenneth J. Carriek, Clerk.

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And afterwards, to-wit: On the twentieth day of February, 1943, there was filed in the office of the Clerk of this Court, a Cross Petition, which said Cross Petition appears in the printed record but is not copied herein.

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And afterwards, to-wit: On the twenty-third day of August, 1943, there was filed in the office of the Clerk of this Court, a Motion to Remand, which said motion is in the words and figures following, to-wit:

## IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Corn Products Refining Company,  
a Corporation, and Corn Prod-  
ucts Sales Company, a Corpora-  
tion,

Petitioners,

Case No. 8116.

vs.

Federal Trade Commission,

Respondent.

MOTION OF RESPONDENT TO REMAND THE CASE  
FOR MAKING OF AMENDED FINDINGS OF FACT  
AND CONCLUSION.

To the Honorable Judges of the United States Circuit Court  
of Appeals for the Seventh Circuit:

Comes now the Federal Trade Commission, respondent  
herein, and through its counsel specifically directed and au-  
thorized so to do, hereby moves the Court to remand the  
case to the Federal Trade Commission for the purpose of  
making amended or additional findings as to the facts, con-  
clusion, and order to cease and desist that are now before  
this Court for review.

In support of this motion Respondent states:

1. The granting of this motion would be in harmony with action taken by this Court on its own motion as reflected in an opinion rendered on May 10, 1943 in the case of A. E. Staley Manufacturing Company vs. Federal Trade Commission, No. 8072.
2. The two cases are quite similar with respect to whether the effects of the price discriminations found "may be" those specified in the statute or whether the effects have been and are those specified therein.
3. The two cases are quite similar with respect to the omission of the Commission to make findings regarding good faith in meeting an equally low price of a competitor.
4. The two cases are quite similar insofar as they concern the status of price discrimination resulting from use of a delivered price system in which the delivery charges are figured from a place other than the place of actual shipment.

The Commission submits that the issues in the two cases regarding price discrimination, are so similar that the remand already directed in the Staley case logically calls for similar action in the present case at this time and without waiting for briefs and argument on the merits to develop that similarity.

Respectfully submitted,  
Federal Trade Commission,  
W. T. Kelley,  
Chief Counsel,  
Walter B. Wooden,  
Assistant Chief Counsel.

Washington, D. C.,  
August 20, 1943.

Endorsed: Filed August 23, 1943. Kenneth J. Carrick,  
Clerk.

And afterwards, to-wit: On the twenty-seventh day of August, 1943, there was filed in the office of the Clerk of this Court, an Answer to Motion to Remand, which said Answer is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Corn Products Refining Company,  
a Corporation, and Corn Products Sales Company, a Corporation,

*Petitioners,*

*vs.*

Federal Trade Commission,

*Respondent.*

Case No. 8116.

ANSWER OF PETITIONERS TO MOTION OF RESPONDENT TO REMAND THE CASE AND MEMORANDUM IN OPPOSITION TO THE MOTION.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Come Now petitioners and oppose the motion of respondent that the Court remand the case to the Federal Trade Commission for the purpose of making amended or addi-

tional findings as to the facts, conclusion and order that are now before this Court for review, and as reasons for their opposition respectfully show as follows:

1. Respondent's motion is predicated on the allegation that the instant case and the case of *A. E. Staley Manufacturing Company vs. Federal Trade Commission*, No. 8070 are quite similar in various respects and that the granting of the motion to remand would be in harmony with the action of the court in the latter case. Although it is admitted that in certain respects the two cases are similar, nevertheless the instant case involves other and important issues which were not present and were not decided in the Staley case and as to which petitioners are entitled to an early adjudication. This will appear from the following:

2. The first issue in the instant case is whether the differences in prices of corn syrup at different destinations resulting from the basing point method of determining delivered prices constitutes discrimination within the meaning of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act. This question was involved in the Staley case but was not decided by this Court. Instead the Court concluded as petitioners have contended that even if it be assumed "that the Commission properly found that there was discrimination in price of commodities sold in commerce", the other element of violation of the statute, the prohibited effect on competition, was not present.

Even on this point petitioners contend that in the instant case the Court should annul the Commission's Order rather than remand the proceeding to the Commission for further Findings if justified by the record or for further hearing. The Federal Trade Commission instituted its proceeding against these petitioners on October 21, 1938. Numerous hearings were held at which the respondent had ample opportunity to present any evidence within its possession bearing upon the effect on competition of the alleged price discrimination. Petitioners at that time, although believing that the proceedings were not justified for the reason that the alleged price differences, as petitioners contended, did not constitute discrimination within the meaning of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, nevertheless informed counsel for the respondent that they were prepared to participate in additional hearings in various sections of the country. Petitioners were confident, and so advised counsel for the respondent



at that time, that evidence obtainable at such further hearings would fail to show that the price differences had the effects on competition prohibited by the statute. However, after considerable negotiations, in lieu of further hearings certain stipulations were entered into which constitute the evidence of record on this phase of the matter. The stipulations on this point are somewhat different from the stipulation in the Staley case and cover facts not set forth in that stipulation. Under the circumstances, even if the issues in the instant proceeding were in all respects similar to those in the Staley case, it is submitted that the Court should not remand the case but should proceed to a judgment.

3. Petitioners are, however, especially desirous of obtaining an adjudication upon the issue not decided by the Court in the Staley case, namely, whether the differences in delivered prices at different destinations resulting from the basing point price system constituted discrimination within the meaning of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act. It is important from the standpoint of petitioners and of the corn refining industry as a whole that an adjudication be obtained upon this issue. If the contentions of petitioners are upheld that Congress by the Robinson-Patman Act did not intend to prohibit difference in prices resulting from the basing point method of determining delivered prices, then it becomes immaterial to consider whether these price differences had the effects on competition necessary to constitute a violation of the statute, and further hearing on the latter point would be superfluous. The legal question as to the effect of the statute is particularly important to these petitioners and the instant case presents the question in perhaps more acute form than it was present in the Staley case for the reason that petitioners have plants at both Chicago and Kansas City and the determination as to the plant from which a particular sale shall be filled rests with petitioners. There is therefore present in the instant case not only the question whether Congress by the Robinson-Patman Act, so-called, intended to prohibit as unlawful discrimination differences in prices produced by the basing point system but also whether in a situation such as that of these petitioners, where one of their plants is located at the basing point, differences in price resulting from the selection of the point from which shipment is to be made, could come within the contemplation of the statute. Petitioners submit

that before they should be subjected to the burden of further hearings, or further proceedings before the Federal Trade Commission, they are entitled to an adjudication upon this question of law which may eliminate any necessity for further proceedings.

4. In addition to the foregoing angles of the matter, there are in the instant case the following other issues which were not present in the Staley case or were not determined by the Court therein:

(a) Whether differences in prices for corn syrup in different types of containers constitute price discrimination within the prohibition of the Clayton Act as amended by the Robinson-Patman Act.

(b) Whether the delivery of corn syrup to customers after the lapse of more than the usual period of time following a price change constituted a price discrimination within the prohibition of the statute in question.

(c) Whether the sale of corn syrup in tank car lots to customers who ordinarily purchase corn syrup in lesser quantities and who do not have facilities for unloading railroad tank cars, violates the statute.

(d) Whether in the foregoing transactions and in the case of discounts or allowances to purchasers of feed and allowances to purchasers of starch the alleged discrimination had the effect upon competition requisite to a violation of Section 2(a).

5. Finally the present suit involves an issue of great importance to these petitioners which does not arise under Section 2(a) but arises under Section 2(e) of the Clayton Act. This is the question whether an arrangement made by petitioners for the cooperative advertising of one of petitioners' products with the products sold by a candy manufacturer, was unlawful. Petitioners respectfully submit that on this important issue they are entitled to an early adjudication and that the uncertainty created by the decision and order of the Federal Trade Commission should not be continued by remanding the case to the Federal Trade Commission.

6. Petitioners respectfully submit that they are entitled to an adjudication by this Court of the issues raised by their petition. Petitioners have incurred the expense of printing the record for the purposes thereof and their brief has been prepared and is ready for printing.

Wherefore, petitioners pray that respondent's motion to

remand may be denied and that the case may proceed to argument and decision of this Court in due course.

Respectfully submitted,

William S. Jameson,  
Office and P. O. Address,  
315 Grand Central Station,  
Chicago, Illinois,

Parker McCollester,  
Office and P. O. Address,  
25 Broadway,  
New York, N. Y.,

*Attorneys for Petitioners.*

Frank H. Hall,  
Office and P. O. Address,  
17 Battery Place,  
New York, N. Y.,

Sidney S. Coggan,  
Lord, Day & Lord,  
Office and P. O. Address,  
25 Broadway,  
New York, N. Y.,  
*Of Counsel.*

Endorsed: Filed August 27, 1943. Kenneth J. Carrick,  
Clerk.

And afterwards, to-wit: On the twenty-eighth day of August, 1943, the following further proceedings were had and entered of record, to-wit:

Saturday, August 28, 1943.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Corn Products Refining Company,  
a Corporation, and Corn Products Sales Company, a Corporation,  
Petitioners.

On Petition for Review of Order of the Federal Trade Commission.

8116 vs.

Federal Trade Commission,  
Respondent.

It is ordered that the motion of counsel for respondent to remand this case for making of amended findings of

fact and conclusion be denied, without prejudice to the right to renew said motion at the hearing of this case on the merits.

And afterwards, to-wit: On the twentieth day of January, 1944, the following further proceedings were had and entered of record, to-wit:

Thursday, January 20, 1944.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Hon. Otto Kerner, Circuit Judge.

Hon. Walter C. Lindley, District Judge.

Corn Products Refining Company,  
a Corporation, and Corn Prod-  
ucts Sales Company, a Corpora-  
tion,

*Petitioners.*

8116

*vs.*

Federal Trade Commission,

*Respondent.*

On Petition for Re-  
view of Order of  
the Federal Trade  
Commission.

Now this day come the parties, by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Parker McCollester, counsel for petitioners, and by Mr. Walter B. Wooden, counsel for respondent, and the Court takes this matter under advisement.

And afterwards, to-wit: On the sixth day of July, 1944, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 8116.

OCTOBER TERM, 1943, JANUARY SESSION, 1944.

CORN PRODUCTS REFINING COMPANY,  
a Corporation, and CORN PROD-  
UCTS SALES COMPANY, a Corpora-  
tion,

*Petitioners,*

*vs.*

FEDERAL TRADE COMMISSION.

*Respondent.*

On Petition for Re-  
view of order of  
the Federal Trade  
Commission.

July 6, 1944.

Before MAJOR. KERNER, *Circuit Judges*, and LINDLEY,  
*District Judge*.

LINDLEY, *District Judge*. Respondent issued a complaint on October 21, 1938, amended March 25, 1939, charging that petitioners had violated Sections 2 (a), 2 (e) and 3 of the Clayton Act, as amended by the Robinson-Patman Act, U. S. C. Title 15, Sec. 13. Petitioners answered denying the charges and averring that, if the acts complained of are prohibited, the statute is unconstitutional when so applied. The ensuing order, which petitioners seek to set aside and respondent to have enforced, directs petitioners to cease and desist from (1) discriminating in prices between purchasers of glucose, starch products and corn gluten feed and meal; (2) supplying services to Curtiss Candy Company in the latter's resale of dextrose purchased from petitioners while failing to accord similar facilities to other and competitive customers upon proportionally equal



terms; and (3) selling certain merchandise "on the condition that the purchaser shall not use similar products of a competitor."

*Sales of glucose at delivered prices based on Chicago price and freight from that city but delivered from Kansas City.*

The evidence upon this phase of the controversy is not in dispute. Petitioners manufacture glucose (corn syrup) in Chicago and Kansas City, and ship it from these two points to purchasers residing in various cities in the west and southwest. From which plant deliveries shall be made is entirely within control of petitioners and the selling prices are fixed by them by adding to the effective Chicago price the freight rate from that city to destination, regardless of whether the merchandise is forwarded from Kansas City or from Chicago. Under this formula, glucose delivered from Kansas City to places nearer that city sells at the Chicago price plus the freight from Chicago, which exceeds freight from Kansas City by substantial percentages; the excess for St. Joseph being approximately 31 cents per 100 pounds; Fort Smith, 20 cents; Hutchinson, 25 cents; Lincoln, 16 cents; Waco, 19 cents; Sherman, 20 cents; San Antonio, 19 cents; Denver, 10 cents and Salt Lake City, 10 cents. Purchasers in these cities are manufacturers using glucose in making candy, competitively engaged in sale of their products to customers located in various states.

Glucose is a major raw material entering into many candies; constituting from 5 to 90 per cent. of the weight of the finished article, being greater in the cheaper classes. The higher prices paid in cities other than Chicago "result to a greater or lesser degree" in higher material costs than those of manufacturers in Chicago. Those paying the higher prices "may attempt to recover such increased costs" by increasing the price or making sales "on a non-profit or other basis"; the effect in any case is to reduce profit *pro tanto*. The result just mentioned may work out either through the absorption of higher costs in sale at competitive prices or indirectly through a reduced volume of business and the ultimate effect may be to diminish the ability of those paying the higher prices to compete with those paying the lower. These results may be avoided or augmented by the effect upon the cost to such manufac-

turers of such other factors as labor, taxes, rents, insurance, other ingredients, proximity to markets and delivery.

The Commission found that a purchaser located nearer freight-wise to Kansas City than Chicago who receives delivery from Kansas City is forced to pay a price which includes an item for delivery not actually incurred; that Chicago purchasers receiving delivery from Kansas City buy at a price which does not include any freight, artificial or real, and that any purchaser located nearer Chicago than Kansas City who receives delivery from the latter point is charged a price which does not include all of the actual freight. Its ultimate finding was that such discrimination results in substantial injury to petitioners' competitors; hinders, obstructs and tends to suppress competition among petitioners' customers and to create a monopoly in processing and refining corn and in sale and resale of its by-products and has resulted in substantial injury to competition among purchasers by affording substantial unjustified price advantages to preferred customers and not to others, in violation of subsection (a), Section 2 of the Act.

Our inquiry is whether the evidence is such as to justify the finding that petitioners have discriminated in prices between competitive purchasers of commodities of like grade and that such discrimination will probably substantially lessen competition or tend to create a monopoly in commerce or to injure, destroy or prevent competition with any person who knowingly receives the benefit of such discrimination or whether the evidence discloses that the discrimination grew out of only due allowance for differences in the cost of delivery resulting from different methods or quantities of sales and deliveries under Section 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U. S. C. A. Section 12.

When purchasers receive goods from Kansas City, the sales price of which is fixed by charging the Chicago quotation plus the freight from Chicago rather than that from Kansas City, at a substantial increase of cost to the purchasers, a fictional factor is included in the sales price which is warranted in no way by actual delivery cost or other element. In some instances the price does not include all the actual freight; in others it includes more. In other words the item of freight from Chicago upon goods shipped from other points is an artificial element of cost arbitrarily added by petitioners. That it is substantial is

apparent; in some instances amounting to approximately \$400 per carload. Consequently, so far as this ingredient is concerned, purchasers in cities discriminated against have higher costs of manufacture than those elsewhere with whom they are competitively engaged in purchase of petitioners' glucose and sale of candy made therefrom. The parties stipulate that the effect "may be" to diminish the ability of those paying the higher prices to compete with those paying lower prices and that such increased cost can be met only by raising the prices of finished products or by making sales on a non-profit basis. In either event, obviously, the profit is reduced, in the absence of any offsetting factor. Consequently, some competitors have moved to Chicago, thereby decreasing their cost not only by reducing the actual cost of delivery but also by elimination of the fictional freight charge to which they were subjected when located in less favorably treated communities.

In so far as the delivery price includes for freight more than the actual cost of transportation it measures a definite discrimination forbidden by statute. Upon the principle of equality, the Act forbids any difference in charges to different competitive customers not based upon actual differences in service or delivery. If a difference is to be justified because of presence of the latter element, it must have some reasonable relationship to actual cost and may not be of such character or quality as to work an unjust discrimination. *Western Union Telegraph Co. v. Call Publishing Company*, 181 U. S. 92, 100. The inclusion of a fictional cost of delivery, having no justification in fact, in itself suggests, upon the part of the manufacturer, arbitrary fixation of prices discriminating illegally as between competitive customers. Systematic price discrimination is irreconcilable with free, active competition. It is not the kind of price competition found in a truly competitive market. Thus in *U. S. v. Sugar Institute*, 15 F. Supp. 817, the court condemned and enjoined defendants from "determining transportation charges or freight applications to be collected from customers or limiting freight absorptions" and "selling only on delivered prices or on any system of delivered prices, including zone prices or refusing to sell f. o. b. refinery." Upon appeal defendants waived their assignments of error as to each of these. The Supreme Court modified the decree in other particulars, not pertinent here, and affirmed in all other respects.

*Sugar Institute v. U. S.*, 297 U. S. 553, 561, 605. Thus defendants were finally enjoined from selling at prices including artificial or fictional items of freight and the court adhered to the reasoning of *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, forbidding "any difference in charge not based upon difference in service."

We think it irrefutable from the facts that resulting substantial loss is reasonably likely to accrue to purchasers in the less favorably located communities. The statute does not require proof of actual injury. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346. Under Section 2(a) it is unlawful to discriminate in price between different purchasers where the effect "may be" substantially to lessen competition or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. It is the congressional intent to halt in its incipency any possible injury to the public before it may have actually weakened the fabric of fair competition.

Petitioners' argument as to the wisdom or desirability of the expressed congressional economic policy is wholly beside the point. It is elementary, but it will work no harm to reiterate, that with determination of the wisdom of legislative policies, we are in no way concerned. It is far beyond our function to decide or declare what is wise or unwise in statutory economic, political or fiscal tenets. The Congress is charged with the obligation to determine all such questions. When a standard of conduct has once been fixed by legislative enactment, the only functions of the judiciary, as a coordinate branch of government, are so to interpret the statute as to promote and effectuate the disclosed intent of Congress, to determine whether a factual situation is within the contemplation of the act and whether the legislation or the actions of administrative bodies charged with enforcing it infringe upon the constitution. If the standard proves unsatisfactory or unwise, relief can emanate only from Congress.

In this connection petitioners insist that debates in the Congress disclose that it was not the intent of that body to place the "basing-point" system of distribution of commodities beyond the pale; that the Congress, *sub silentio* approved the method and that its acts are within the range of such approved procedure. We are not advised that such so-called system has any recognized legal definition or any

well established boundary lines. Just what pattern it follows is uncertain. And to us the debates indicate at most only disagreement between members of the Congress as to the desirability or non-desirability of any such practice, resulting in the end, in utter silence in the Act upon that subject matter,—neither condemnation nor approval, and this in face of the fact that the Federal Trade Commission previously in 1924 had held that the “basing-point” method of distribution employed by the steel companies embraced unlawful price discrimination under the Clayton Act. 8 F. T. C. 1. Such was the administrative ruling in effect at the time when Congress acted. Indeed, in presenting the bill the member in charge announced that he believed the system to be “indefensible.” Rather than indulge in futile inquiry as to what individual members of the Congress may have thought as to what is wise economic policy in this respect, we conceive it our duty to give effect to the words of the statute as written and to determine not whether any suggested formal pattern is beneficial and desirable but whether the specific practice of petitioners is within the prohibition. A search for meaning, for significance, in the silence of the Congress is fraught with such speculation as to afford little aid in the interpretation of express words. *Scripps-Howard Radio Inc. v. Federal Communications Commission*, 316 U. S. 4, 11. As we read the Act, it does not grant exemption from discrimination merely because the facts fall within certain formulae. The real question is, do the discriminations inherently have the condemned probable effect upon competition.

Petitioners' reliance upon *Staley Mfg. Co. v. Federal Trade Commission*, 135 F. 2d. 453. (CCA 7) is of no avail when we regard the comparative factual situations. In its final determination the court has there condemned the practice here disapproved. The final disposition of that case grew out of the belief of the court that the manufacturer was, under the facts there involved, justified in what it did in the proviso of the statute exempting the vendor from liability if it proves that the practice complained of is necessary, in good faith, to meet the lower prices of competitors. In other words, the facts were such, in the belief of the majority, as to rebut, as provided by the Act, the *prima facie* case of violation made by the Commission. No



such question is presented to us here, for the present record discloses no such contention and no such rebutting facts.

Nor do we think that there was lack of proof that the purchaser knowingly received the benefit of the discrimination, in the face of the fact that certain customers have moved to Chicago from outlying cities; that it is well known to the public that petitioners' prices include a charge for freight from Chicago wholly fictional when goods are shipped from other places, and that a customer getting wares in or near Chicago at a delivered price including actual Chicago freight well knew that he was thereby buying at a proportionately lower price than his competitors in the various cities named were charged when they were supplied from Kansas City at the Chicago price plus a fictional freight from Chicago.

*. Discriminations from Booking Practices.*

The evidence discloses, without contradiction, that upon promulgation of price advances, petitioners, sometimes, for a period of from five to ten days after an announced increase, accept orders for future delivery at the previously prevailing lower price. In other words, they allow favored customers options for delivery in the future at the old lower prices rather than the new higher ones. Later deliveries upon these options consummate completion of the contracts and frequently extend over substantial periods after establishment of the new prices. Petitioners also accept orders for sales by tank cars to customers who have no facilities for handling such cars and who, consequently, receive delivery from tank wagons which are supplied from petitioners' storage. The price charged is the lower tank car price.

We think the only reasonable inference is that each of these favored customers receives inevitably an illegal discriminatory advantage. Although, ostensibly, all customers are subject to the same terms, the privilege of booking orders on an advancing market for future deliveries at abandoned lower prices, creates discrimination in fact, whereby certain purchasers may be able to buy at substantially lower prices than their competitors. No customer knows how another is being treated. The agreed fact that the result "may be" that after a price increase, one customer is purchasing goods at the new and higher price and another at the old lower price, in itself, is sufficient to jus-

tify the ultimate finding. There is no exemption from liability for such action in the statutory provision that petitioners may select their own customers in bona fide transactions and, not in restraint of trade. The Commission was amply justified in finding the practices reasonably likely to diminish the buying ability of those paying high prices as compared with competitors paying the lower prices.

Petitioners contend that the *prima facie* case of discriminatory booking practice is rebutted "by showing that a lower price was made in good faith to meet an equally low price of competitors" as authorized by subsection (b) of Section 2 of the Clayton Act as amended by Robinson-Patman Act, 15 U. S. C. A., Section 13. We think the evidence is insufficient to sustain this affirmative defense. After the Commission had made out its *prima facie* case, petitioners offered testimony to justify their action under subsection (b) but it was general in character and vague in effect, being merely that the discriminations occurred because of a competitive situation brought upon petitioners where "some competitor had offered purchasers the same proposition" and that, after a bitter controversy had arisen in which the wagon buyers claimed they had been discriminated against in favor of car buyers, competitors took orders from wagon buyers at tank car prices which the witness said, "I suppose forced us to do likewise." There was no testimony as to specific instances or facts but merely a conclusion upon the part of the witnesses that the *prima facie* case of discrimination was justified by competition. This, it seems to us, is not the sort of testimony sufficient to sustain a finding of exemption provided by Congress for meeting competition or to justify a finding that the *prima facie* case of discrimination as to booking practices has been rebutted. Indeed, if competitors' prices were arrived at in the same manner, to approve the defense, we would be driven to the inconsistent position of approving one evil practice because it was indulged in in order to meet a similar evil practice.

*Special allowances to certain buyers of gluten feed and meal.*

It is stipulated that petitioners sold to Cooperative Mills in Buffalo, gluten feed and meal under contracts whereby the vendors agreed to allow the purchaser a deduction from

the market price amounting to 50 cents per ton upon purchases in certain quantities and to 65 cents per ton upon those in certain larger quantities; that the purchaser resold these products, both unmixed and as ingredients in other mixtures, to agent buyers and retail stores controlled by it; that, during the same period, petitioners sold the same wares to other dealers and feed-mixers in the same territory competing directly with Cooperative, without discount or rebate. Similar are the facts as to purchases by Allied Mills, Inc., Chicago, Jesse C. Stewart & Company, Pittsburgh, E. W. Bailey & Company, Montpelier, Vermont, Marshfield Milling Company, Marshfield, Wisconsin, and Farley Feed Company, Janesville, Wisconsin. The allowances are sufficient, if and when reflected, "to attract business to the Cooperative" and similar purchasers "away from their respective competitors or to force competitors to resell such products at a substantially reduced profit or to refrain from selling" and the allowance is sufficient to increase substantially the favored purchasers' respective margins of profit. There was no evidence that these differences constituted only due allowance for actual differences in cost of manufacture, delivery or otherwise. The Commission held the discrimination illegal.

These purchasers have been given discounts of 50 cents or more a ton from the regular market prices. One receives a discount on purchases of not less than 1200 tons per month, and a greater one if his deliveries are not less than 1500 tons per month, with an additional 15 cents per ton on purchases exceeding 2500 tons per month. Four others receive similar discounts, although they purchase much smaller quantities. Each is in competition with others in its territory. Again petitioners assert that the necessary adverse effect upon competition must be an actuality rather than a reasonable probability and that, in the absence of proof that the favored customer uses the discriminatory price to undersell, the possibility that such adverse effect is reasonably probable is conclusively negated. We think the facts lead to the opposite inference and that the natural result is even more than "reasonably probable" to produce the prohibited injurious effect upon competition.

*Allowances to Keever Starch Company and Stein Hall Company.*

The facts regarding this phase of the case were stipulated and were similar in import to those mentioned under the last heading. Petitioners make no contention that these allowances are justified in the cost of manufacture, sale or delivery and agree that "if and when reflected" they are sufficient to attract business to the favored purchasers and away from their competitors so as to force the latter to resell such products at substantially reduced profit. The Commission concluded that the practice was in violation of the Act.

Under the facts stipulated with respect to this issue substantially the same question as to the sufficiency of the evidence of the effect upon competition involved in the sales of gluten feed and meal is presented. We think, without restatement, that there is proof of a reasonable probability of injury to competition.

*Petitioners' arrangement with Curtiss Candy Company.*

The Commission found that in entering into their arrangement with Curtiss Candy Company for advertising dextrose, petitioners have unlawfully discriminated in favor of one purchaser against other purchasers of a commodity bought for resale, furnishing a service or facility connected with processing and selling such commodities, without according to all purchasers proportionately equal terms in violation of Section 2 (e) of the Act.

In 1936 and prior thereto, dextrose, (refined corn sugar), was not largely used by housewives or in industry. Anxious to augment their volume of sales, petitioners entered into an arrangement with Curtiss Candy Company, one of the largest American manufacturers of candy bars. After experimentation, Curtiss undertook the use of dextrose as an ingredient in its products, to advertise the latter as "rich in dextrose" and to attempt to persuade the public of the beneficial quality of the element. This it proceeded to accomplish through nation-wide advertising, featuring the presence of dextrose in its candy, spending some \$200,000 or more a year in the project. Contemporaneously, petitioners similarly advertised Curtiss candies, emphasizing their dextrose content, expending in three-

years for this purpose some \$750,000. In the years during which this advertising continued, the purchases of dextrose by Curtiss from petitioners increased over five-fold and those of glucose from nothing in 1937 to over 14 million pounds in 1939. During all this period petitioners were selling substantial quantities of dextrose to other candy manufacturers who were in competition with Curtiss without making or offering them, or all of them at any rate, any proportionately equal terms. Rather, they "instructed their salesmen to advise customers to whom they sold products to be used in the manufacture of confectionery that we do not contribute to advertising done by customers."

Petitioners do not challenge the basic facts underlying the order in this respect but attack the validity of the ultimate finding of unlawful discrimination. They contend (1) that the transaction was not made with Curtiss as a purchaser; (2) that Curtiss bought no commodity for resale either with or without processing; (3) that there is failure of proof of discrimination between purchasers for resale; (4) that they did not furnish facilities connected with the processing, handling, or reselling of dextrose by Curtiss; (5) that the proof fails to show that petitioners failed to accord such arrangement to other purchasers on proportionately equal terms, and, finally, that there is no proof of sale to Curtiss in interstate commerce.

There is no express agreement that preferences to Curtiss were to be any part of the project. But the expenditure of \$750,000 in advertising Curtiss candies and the dextrose in them, with the proof of voluminous increase of purchases, not only of dextrose but of glucose, by Curtiss during this period is amply sufficient to support the inference of the Commission that the arrangement was made with Curtiss for the purpose of building up petitioners' sales of dextrose to it and to others and resulted in vast expenditures by petitioners for the sole benefit of Curtiss to the detriment of other competing purchasers.

The statute forbids furnishing preferential services or facilities "connected with" processing and selling a commodity. It applies where the commodity is bought for resale "with or without processing." Petitioners argue that when dextrose becomes part of a mixture, its identity ceases, being merged in the composite product, and that it is, therefore, beyond the definition of commodities af-



fectured by the Act and embraced in the words "with or without processing." Obviously in manufacture of finished products, in the compounded result, many ingredients lose their identity. Dextrose, constituting from 5 to 90 per cent of the product when it emerges in candy, is not capable of being isolated thereafter except by chemical reduction. But processing is a relative term. It embraces many modes of treatment of various materials to produce given results. It is an act or a series of acts with regard to the subject matter in its transformation into a different state or a different thing. It effectuates change in form, contour, chemical combination, physical appearance or otherwise by artificial or natural means and, in its more complicated form, involves progressive action in performing, producing or making something. *Cochrane v. Deener*, 94 U. S. 780; *Sharpless Co. v. Crawford Farms*, 287 F. 655 (CCA 2); *Bedford v. Colorado Fuel & Iron Corp.*, 81 P. 2d. 752, 757. We think that when Curtiss made its product, it changed the form of the dextrose used, in a progressive series of steps involved in making candy, so treating the material as to produce a desired given result, eventuating in a different state or thing. The advertising paid for by petitioners informed the public that Curtiss candy was "a blending of dextrose" with other such ingredients as chocolate, butter and milk. We think Congress, when it forbade extension of special facilities to one purchaser not accorded to others, intended to forbid special favors to one purchaser over competitors in all cases where goods are sold and resold without processing or are included in a processed product. Congress evidently contemplated that when a product is purchased, it may either be consumed by the purchaser or resold by him in its original form or after having been made a part of a compounded product. Evidently Congress employed the words "with or without processing" as an all comprehensive term. This conclusion seems inevitable when one considers the purpose of the legislation. Consequently the reasoning of *Fleming v. Hawkeye Pearl Button Company*, 113 F. 2d. 52 (CCA 8) is not applicable. There the court was dealing with an entirely different problem; an entirely different statute, having entirely different purposes. The court's reasoning obviously rested upon the congressional purpose involved in that specific statute. It does not apply to the Act with which we are concerned here.

The contention that no proof of discrimination between purchasers of dextrose for resale exists is closely related to petitioners' first assertion that the arrangement was not made with Curtiss as a purchaser for resale. In this connection petitioners insist that there is no proof that dextrose purchased by other candy manufacturers was bought for resale. But the record discloses that prior to 1936 dextrose was not well known to the confectionery industry and that experimentation, research and advertising produced a demand for it, and, further, that large quantities were bought by candy manufacturers, competitors of Curtiss, after 1936 and during the period when petitioners were advertising Curtiss' product. The only reasonable inference is that competing candy manufacturers were purchasing dextrose for the very purpose for which Curtiss was purchasing it, in pursuance of the demand built up for dextrose in candy as a result of the advertising of Curtiss and petitioners. There is no requirement in Section 2 (c) that there be proof of actual substantial benefit to one or of substantial injury to another of two or more competitors. This paragraph does not require even probability of adverse effect upon competition as does Section 2 (a). We think it is satisfied by proof of special services rendered one purchaser not rendered to similar competing purchasers engaged in the same business and using the commodity for the same purpose.

Petitioners claim that they did not furnish facilities in connection with processing, handling or selling dextrose by Curtiss. What we have said demonstrates that this contention can not be upheld, for the record discloses that petitioners did furnish the advertising for the benefit of Curtiss who was a steady and growing purchaser of dextrose from petitioners, and to it alone.

Petitioners assert that there is no proof that they failed to offer the same arrangement to other persons on a proportionally equal basis. We find no evidence that similar services, terms or facilities were accorded to other purchasers.

As to the assertion that there is no proof that dextrose was sold to Curtiss in commerce, it is sufficient to observe that petitioners sold the product to purchasers located throughout the United States and shipped it in interstate commerce to such purchasers; that there was competition

in commerce between Curtiss and other manufacturers of candy bars; that Curtiss' business and that of petitioners' are of interstate and national character and that the transactions in question were part and parcel of interstate commerce and directly affected such commerce.

*Sales to Huron Milling Company and Keefer Starch Company.*

After the Huron Milling and Keefer companies had ceased manufacture of pearl starch, petitioners produced for them their requirements of that commodity and sold it to them at prices below the cost at which they could have manufactured it. Each agreement provided for sale of the requirements of the purchasing company and ran for fifteen years. The parties stipulated that these contracts obligated the two companies to refrain from using, receiving or delivering any starch or starch products manufactured by competitors of petitioners. The Commission directed petitioners to cease and desist. They have not sought to set this portion of the order aside but respondent seeks to have it enforced.

Petitioners assert that they and the two companies have already agreed to eliminate the covenant to purchase entire requirements from petitioners and the latter insist, therefore, that they have not disobeyed the order with respect to these contracts. But there is no proof of this averment; no showing of desistance or compliance. The claim merely presents a question of fact without any showing in the record to justify any review by us.

Furthermore, the mere discontinuance, were it proved, would not justify us in refusing to enforce the order. *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U. S. 257; *Bunte Bros. v. Federal Trade Commission*, 104 F. 2d. 996 (CCA 7); *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307 (CCA 7); *Hershey Chocolate Co. v. Federal Trade Commission*, 121 F. 2d. 968 (CCA 3).

*Differentials arising from sizes of shipping containers.*

Petitioners shipped its products to its customers in car-load lots, tank truck loads, returnable steel drums, barrels, half barrels, 10-gallon kegs and 5-gallon kegs. An estab-

lished differential in prices existed, dependent upon the size of the containers, the additional price per 100 weight over tank car prices being as follows: when shipped in tank trucks of the customer, 2 cents; when delivered by petitioners' equipment, 10 cents; when shipped in returnable steel drums, when there is no return freight paid, 13 cents; when the return freight on the empty drum is between 50 cents and 75 cents per hundred, 18 cents; when it is between 76 cents and 90 cents per hundred, 23 cents; when it is between 91 cents and \$1, 28 cents; when the return freight on the empty drum is more than \$1 per hundred, 33 cents; 5-gallon kegs \$1.08; 10-gallon kegs 98 cents; half barrels 56 cents; barrels 33 cents. This is the only evidence submitted upon this issue and upon it the Commission found petitioners guilty of unlawful discrimination.

The evidence is merely that the smaller the container the greater proportionately the cost. There is nothing to show that this resulted in any discrimination among competing purchasers other than to create such differences as normally arise in buying in smaller quantities or in larger quantities. We think the facts furnish no basis whatever for any sound inference of violation of the law in this respect.

We conclude that in all respects other than alleged discriminations arising from sales in different size containers, the findings and conclusions of the Commission are amply justified; that as to the different prices in different size containers there is no evidence to justify the Commission's conclusion. Accordingly the order is modified by eliminating that portion. In all other respects it is affirmed and enforced. Petitioners' prayer to vacate the order is denied in all respects other than as to goods sold in different size containers.

Judgment in accord with our conclusions may be submitted.

MAJOR, C. J., concurring in part and dissenting in part.

I concur in all respects except as to the holding that petitioner's delivered price is a discrimination in violation of § 2(a) of the Clayton Act as amended. As to this I dissent, for the reason that a delivered price predicated upon use of the basing point price system does not, in my opin-

ion, come within the proscriptions of the section. My views in this respect have been expressed in the dissent which I have filed in *Staley Manufacturing Company v. Federal Trade Commission*, decided by this court July 6, 1944.

Endorsed: Filed July 6, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the sixth day of July, 1944, the following further proceedings were had and entered of record, to-wit:

Thursday, July 6, 1944.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Hon. Otto Kerner, Circuit Judge.

Hon. Walter C. Lindley, District Judge.

Corn Products Refining Company,  
a Corporation, and Corn Prod-  
ucts Sales Company, a Corpora-  
tion,

8116

vs.

Federal Trade Commission,

Respondent.

On Petition for Re-  
view of Order of  
the Federal Trade  
Commission.

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the Federal Trade Commission entered in this cause on March 16, 1942, be, and the same is hereby, modified in accordance with the opinion of this Court, and as so modified, enforced.

And afterwards, to-wit: On the twenty-first day of July, 1944, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which said petition is in the words and figures following, to-wit:







IN THE  
**United States Circuit Court of Appeals**  
 FOR THE SEVENTH CIRCUIT

No. 8116

CORN PRODUCTS REFINING COMPANY, a Corpora-  
 tion, and CORN PRODUCTS SALES COMPANY, a  
 Corporation, *Petitioners,*

*vs.*

FEDERAL TRADE COMMISSION,  
*Respondent.*

**PETITION FOR REHEARING**

WILLIAM S. JAMESON,  
 Office and P. O. Address,  
 315 Grand Central Station,  
 Chicago 7, Illinois,

FRANK H. HALL,  
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 17 Battery Place,  
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SIDNEY S. COGGAN,  
 LORD, DAY & LORD,  
 Office and P. O. Address,  
 25 Broadway,  
 New York 4, N. Y.,  
*Of Counsel.*

July 19, 1944.



IN THE  
**United States Circuit Court of Appeals**

FOR THE SEVENTH CIRCUIT

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No. 8116

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CORN PRODUCTS REFINING COMPANY, a Corporation,  
and CORN PRODUCTS SALES COMPANY, a Corporation,

*Petitioners,*

*vs.*

FEDERAL TRADE COMMISSION,

*Respondent.*

---

**PETITION FOR REHEARING**

Now come petitioners by their attorneys and, believing that the decision of the Court, entered on July 6, 1944, was in error in the various respects hereinafter indicated, that the rights of petitioners will be seriously prejudiced thereby and that they will suffer grave injury as a result thereof, pray that the Court may reconsider its decision and grant a rehearing herein, and in support of this prayer petitioners respectfully show:

**I.**

The decision of the Court that the differences in prices resulting from the basing point method constitute discrimination prohibited by Section 2(a) of the Clayton Act is contrary to the language of the statute and does violence to the Congressional intention and to the assurances given to procure the passage of the Robinson-Patman Act.

The effect of the majority opinion is that Section 2 of the Clayton Act, as amended by the Robinson-Patman Act,



is to be construed as requiring all sales to be upon an f. o. b. factory price basis. On page 3 the majority of the Court say,

"In some instances the price does not include all the actual freight; in others it includes more."

On page 4 it is said,

"In so far as the delivery price includes for freight more than the actual cost of transportation it measures a definite discrimination forbidden by statute."

The same reasoning would require the conclusion that if some customers are charged a delivered price including the actual cost of transportation of their shipments, while others are charged a price including less than such actual cost of transportation, there is likewise a discrimination forbidden by statute. The only way, therefore, that the statute as interpreted by the majority of the Court, could be satisfied is by the charging of an f. o. b. factory price on each shipment. We submit that neither the language nor the legislative history of the Robinson-Patman Act warrants such an interpretation.

As we argued in our original brief, the sale of goods on delivered prices constructed on the basing point method has been in such general use, with the approval of the courts, *Maple Flooring Manufacturers Association v. United States*, 268 U. S. 563; *Cement Manufacturers Protective Association v. United States*, 268 U. S. 588; *American Column and Lumber Co. v. United States*, 257 U. S. 377, that to support a conclusion that it was made unlawful by the Robinson-Patman Act would require a prohibition of the price differences resulting therefrom in much more definite terms than are there contained.

That which the statute makes unlawful is "to discriminate in price". But these are not new words in Section 2 of the Clayton Act. These words were in this section from its enactment in 1914 and yet had never been held to prohibit differences in delivered prices at different destinations resulting from the basing point method.

For this reason the decision in *Western Union Telegraph Co. v. Call Publishing Company*, 181 U. S. 92, 100, cited by the majority at page 4 of the opinion, does not support its conclusion. That case involved a common carrier which, by reason of its status, was obligated to serve all without discrimination, and the Court held that the charging of different prices to two customers was discrimination prohibited to such a carrier. But such a decision does not greatly aid in discovering what was meant by the words "to discriminate in price" in the statute under which this action is brought. Indeed, to the extent that the decision in the *Western Union* case is pertinent at all here, it supports the conclusion contended for by petitioners, that the discrimination prohibited is the charging of different delivered prices to two buyers at the same destination. For such a discrimination would be produced by the Court's decision here in those cases where, for one reason or another, petitioners should ship to one customer at a given destination from Kansas City and to another at the same destination from Chicago, since, under the statute as interpreted by the Court, petitioners would have to charge different prices based upon the actual freight in each instance.

On pages 5 and 6 of the opinion, the Court, with Judge MAJOR dissenting, dismisses the Congressional debates as an aid in interpreting the language and effect of the statute with the remark (p. 6):

"to us the debates indicate at most only disagreement between members of the Congress as to the desirability or non-desirability of any such practice, resulting in the end, in utter silence in the Act upon that subject matter, \* \* \*."

The majority say further that

"Rather than indulge in futile inquiry as to what individual members of the Congress may have thought \* \* \* we conceive it our duty to give effect to the words of the statute as written \* \* \*."

We submit, however, that examination of the legislative history is not futile in view of the fact that the words of the statute as written are by no means clear and unambiguous but may have a variety of meanings. They might mean, as we suggested in our original brief, that all buyers in every section of the country should be charged the same price; or they might mean that all buyers at a given destination should be charged the same price regardless of point of shipment; or they might mean that all goods should be sold upon what, in effect, is an f. o. b. factory basis. Hence we submit that an examination of the legislative history and the Congressional debates was necessary in order to discover the purpose of Congress and the particular sense in which it employed the words of the statute. Moreover, since, as we have said, the words "to discriminate in price" were in Section 2 before the passage of the Robinson-Patman Act, and since the Commission's complaint here proceeds entirely on the theory that it is only since the passage of that Act amending Section 2(a) of the Clayton Act that petitioners' pricing practices have violated the statute; it is highly important and necessary to examine the discussions in Congress to discover exactly what Congress intended to prohibit by that amending act.

It is true, of course, that the Congressional debates indicate that there were differences between the members of Congress as to the desirability or undesirability of the basing point pricing method. However, the debates leave no doubt that it was the intention of Congress in passing the Robinson-Patman Act in the form in which it was finally enacted *not* to render unlawful the basing point pricing method. The portions of the Congressional debates to which reference was made in our original brief were not mere random statements of "individual members of the Congress", but were statements of the members and chairmen of the Committees who were responsible for telling their colleagues the purpose of the bill and what was intended to be prohibited thereby.

Thus, Congressman Sabath, for the Judiciary Committee, stated that it was recognized that the bill as then be-

fore the House (containing the clause which would expressly ban delivered prices made on the basing point method) had "objectionable features, namely, the antibasing point and the classification provisions" and he desired to inform the House "that the Judiciary Committee has agreed to move to eliminate both of these provisions from the bill." (Congressional Record, vol. 60, p. 8102.) Congressman Crawford, of the Committee in the House, said: "We are going to strike out of this bill the basing-point provision" \* \* \* you cannot keep it in this bill and pass the bill, can you, Mr. Chairman?" to which Congressman Miller, the Chairman, agreed (p. 8127). In the Senate, Senator Borah was asked whether the bill, after the elimination of the clause in question and when it was in substantially the form in which it was finally passed, "changes in any way the present status of the basing-point plan now used by steel and cement and other natural-resource industries." He replied, "My opinion would be that this does not have any effect upon that." In this regard, however, he deferred to the judgment of the Senator in charge of the bill, Senator Van Nuys, who confirmed Mr. Borah's opinion.

We submit, therefore, that the opinion of the majority, far from giving "effect to the words of the statute as written", places upon the statute a meaning and gives to it an effect directly contrary to the intention of Congress. The Court's opinion defeats the will of the majority of Congress by enforcing the statute in accordance with a meaning contrary to the assurances which were given to secure its passage.

\* The provision referred to was that which was intended to bring, and definitely, would have brought, differences in delivered prices resulting from the basing point method within the prohibition of the statute and would, in effect, have compelled sales only at f. o. b. factory prices. This clause defined "price" as used in the bill to mean "the amount received \* \* \* after deducting actual freight or cost of other transportation." The elimination of this clause in order to obtain passage of the bill is, we submit, conclusive proof that Congress did not intend to prohibit differences in prices resulting from the basing point method.

## II.

**The Court failed to give effect to the consequences of the situation resulting from the fact that petitioners have two plants, one at Chicago and one at Kansas City.**

Even if it were not clearly indicated by the debates that Congress definitely intended to leave undisturbed the rights of parties to make sales at basing point delivered prices, it would, under the language of the statute, depend upon the facts in each individual case as to whether prohibited discrimination in fact resulted from the pricing method employed. We understand this to be the reasoning of the Court, but we believe the Court erred in failing to give effect to the peculiar situation here present. Although the Court mentions the fact that petitioners have two plants, one at Chicago and another at Kansas City, at no place in the opinion is there reference to the agreed fact that the plant from which shipment is made in fulfillment of a contract of sale is determined entirely by petitioners, dependent upon conditions in the plants and otherwise as they may then exist.

Corn Products' first plant was at Chicago. At that time it naturally sold at delivered prices plus freight from the Chicago plant, and no basis for the present action would exist if this had remained the only plant, even if the same pricing method had continued, since the freight factor would be the actual freight in every case. However, in 1922 the Kansas City plant was constructed. The case against Corn Products, therefore, really turns, not on the pricing method, but on the existence of petitioner's second plant and the choice of the plant from which each shipment is made. We submit that there is nothing in the statute which requires a company to ship from one plant rather than another or to maintain different prices at each destination; dependent upon the plant from which shipment would ultimately be made. The evidence shows, indeed, that this would be utterly impossible in view of the way in which



glucose is sold. Obviously, when a contract is made, the price must be agreed upon, but at that time it cannot be known from which plant Corn Products will ship since the customer has thirty days within which he may call for delivery and conditions at the plant may change in that time.

Under these circumstances, we submit that even under the interpretation of the statute adopted by the Court, petitioners, having contracted to sell glucose at a certain delivered price, do not discriminate if, when the time comes when the buyer calls for delivery, it is necessary to ship from one plant rather than the other and they charge the price contracted for. Indeed, having two plants (and Corn Products has other plants as well), we submit that the only way in which price discrimination in violation of the Robinson-Patman Act can be avoided is by maintaining and selling at uniform prices at each destination regardless of the actual point of shipment when delivery is ultimately made and regardless of the freight charges actually paid. In this way all buyers at a common destination are placed upon an equality which is far more important than that buyers at different destinations, where there are in any event differences in freight rates, should pay prices related to each other precisely as are the freight charges actually paid.

In the *Staley* case, this Court, although finding discrimination in violation of the Act, has found that the discrimination is excused because Staley is meeting the delivered prices of its competitors. In substance, Corn Products is likewise meeting its own delivered price when it ships from one plant rather than another.

We submit that the Court should reconsider its decision to give effect to this phase of the situation.

## III.

**The Court erred in its opinion with regard to the consequences of alleged discrimination which must be shown in order to establish a violation of the Act.**

On page 5 of the majority opinion, it is said

“The statute does not require proof of actual injury.”

But the statute does require proof of a reasonable probability that the alleged discrimination will substantially lessen competition or “injure, destroy or prevent competition”. Unlike the Interstate Commerce Act, the primary purpose of the Clayton Act is not to prevent discrimination between patrons merely for the sake of insuring equality of treatment between them. The ultimate purpose of the Clayton Act is to prevent monopoly and the prohibition against discrimination is a means to this end rather than a goal in and of itself. *International Shoe Co. v. F. T. C.*, 280 U. S. 291, 298.

Hence it must appear, as the statute specifically provides, not only that there is discrimination in price but that the discrimination will have one of the consequences sought to be prevented. The effect upon competition relied upon here to support the finding of a violation is the effect upon competition between customers of Corn Products, and notably the candy manufacturers.

In *International Shoe Co. v. F. T. C.* *supra*, which was a proceeding under Section 7 of the Clayton Act, which defines the acquisitions prohibited thereby in language similar to that of Section 2(a) as acquisitions whose effect “may be to substantially lessen competition \* \* \* or tend to create a monopoly in any line of commerce”, the Court said that there could be no substantial lessening of competition “if there be no pre-existing competition to be affected.” Therefore, it was incumbent upon the Federal Trade Commission here, first, to establish that there

was substantial competition between buyers from Corn Products and, second, that the sale at delivered prices arrived at by a base price at Chicago plus freight from Chicago to each destination with the option in Corn Products to ship from either of its plants produced a reasonable probability of a real lessening of that substantial competition whenever Corn Products shipped from its Kansas City plant. We submit that there is no such evidence in the record.

The Court expresses the view that the facts establish "that resulting substantial loss is reasonably likely to accrue to purchasers in the less favorably located communities". However, the Court fails to explain and we cannot comprehend how financial loss can be caused to a buyer when a shipment is made to him from Kansas City when at the time he entered into the contract it was possible that the shipment might be made either from Chicago or Kansas City and he contracted for a price based upon this possibility. Nor is there proof either of substantial competition, of substantial loss or of reasonable probability that the difference between the freight rate from Kansas City and that from Chicago has or will substantially impair any buyer's ability to compete in the market where he seeks to sell. For one thing, his competitors may be farther away than he is and pay either higher delivery costs or higher prices for glucose or both. In the absence of proof that some particular buyers were prejudiced and that their competitive ability was impaired in relation to some other particular buyers, or in the absence of expert proof that price differences necessarily have this effect, we submit that the Commission has failed to establish a violation. But all there is is the vague stipulation (Tr. 198, 199), which was the only stipulation we would enter into, because we believed that indefinite and hypothetical statements were all that testimony of witnesses would support. We submit that this stipulation is not proof of facts essential to a finding of a violation.

## IV.

**The Court erred in making unwarranted inferences from the stipulations of fact.**

With all respect, we submit that the Court, like the Federal Trade Commission, has erroneously indulged in an amplification of the stipulations or agreed statements of facts, and that its findings and conclusions as to the effects of the alleged discriminations are the unjustified results of so doing.

We were convinced, first, that if the evidence of witnesses were taken throughout the country it would fail to show substantial competition between buyers at different localities in common markets and it would certainly fail to show that the fact that after a contract had been made with a particular buyer—Corn Products, for one reason or another, fulfilled the sale by shipment from one plant rather than the other affected in the slightest that buyer's ability to compete. Under these circumstances, we certainly would not have entered into a stipulation of facts which would have established a violation of the statute. When the stipulation was being considered we proposed to counsel for the Commission that we were ready and willing to take testimony throughout the country. The stipulation was arrived at after considerable discussion, in large part at the instance of counsel for the Commission in order to avoid travel and protracted hearings. The purpose of the stipulation, as we understood it, was not that it should be used as would the testimony of a large group of individual witnesses as something from which the Commission and the Court would draw their own inferences and deductions. Instead, the stipulation itself was designed to be the ultimate conclusions and the most in the way of findings which any tribunal could deduce from the testimony which would otherwise have been produced. In other words, we conceive that the Commission was obligated to adopt as its findings of fact upon the particular matter in hand the

stipulation itself and was not entitled to add to that stipulation other inferences of its own. We believe that the same limitation applies to this Court. Otherwise great injustice is done to petitioners and the decision rests upon assumptions which we believe contrary to the facts. These contentions seem to be fully in accord with the decisions of the courts of most jurisdictions with regard to the effect and use of stipulations of fact.

The matter appears to have been perhaps most thoroughly explored and considered by the courts of Massachusetts.

In *Koppel v. Massachusetts Brick Co.* (Sup. Ct. of Mass., Franklin 1906), 192 Mass. 223; 78 N. E. Rep. 128; the Court stated the long established rule to be:

"Upon a submission of an action on an agreed statement of facts, the decision is to be made upon the facts actually stated. In the absence of a stipulation that inferences may be drawn from the facts stated, the question is whether the matters agreed upon establish the plaintiff's case. Neither the superior court nor this court can draw inferences of fact either for or against the plaintiff. *Schwarz v. Boston*, 151 Mass. 226, 24 N. E. 41; *Mayhew v. Durfee*, 138 Mass. 584."

In *Morse v. Fraternal Acc. Ass'n of America* (Sup. Jud. Ct. of Mass., Norfolk 1906), 190 Mass. 417; 77 N. E. 491, the same court said at page 493:

"\* \* \* In this case the agreed facts do not show that he received the notice; and although they do contain enough to warrant the court in drawing such an inference, if it were at liberty to do so, yet, in the absence of any provision to that effect, the court is not at liberty to infer the existence of any further essential facts which are not as matter of law necessarily to be inferred; but is confined to the consideration of the facts to which the parties have agreed. *Mayhew v. Durfee*, 138 Mass. 584; *Collins v. Waltham*, 151 Mass. 196, 197, 24 N. E. 327."



In *Welch v. Harrigan*, 79 Pa. Superior Ct. 138 (1922), the Court, citing *Fort Pitt Stamping Co. v. Gas Co.*, 269 Pa. 162, stated the rule in that state to be (p. 142):

"When the parties state the facts that which is not expressly agreed upon and set forth in a case stated must be taken not to exist."

In *Bott v. McCoy and Johnson* (1852), 20 Ala. 578, at page 586, the Alabama court held:

"It is however insisted, that the facts agreed upon would warrant the inference, that Bower & Co. were acting as the agents of McCoy & Johnson in making the sale to Tarleton & Scott. It is a sufficient answer to this to say, that where the facts of a case are agreed upon, and the questions of law alone are submitted to the court for its judgment, we can only respond to the questions of law arising upon the admitted facts. The inference of one fact from another is a question of fact, and not of law, and this inference must be drawn by a jury; and it would be traveling out of the province of the court, as well as of the agreement in this case, if the court was to infer another fact, and pronounce the law arising thereon." (Italics ours)

The rule appears to be the same in Illinois. In *National Bank of Colchester v. Murphy* (Sup. Ct. of Ill. 1943), 50 N. E. (2d) 748, the Court held that it could not deduce inferences from the stipulated facts but was bound by the terms of the stipulation. In *Day v. Chicago & N. W. Ry. Co.* (Sup. Ct. of Ill. 1933), 188 N. E. 540, affirming 269 Ill. App. 435, at page 542, it was said:

"It was stipulated on the trial of the case that the defendant was engaged in interstate commerce, and that the locomotive in question, immediately prior to the time that it was brought into the shops was engaged in interstate transportation. It is claimed by the plaintiff that this stipulation amounted to an admission that the plaintiff was engaged in the work of interstate transportation at the time he was injured. We do not so construe the stipulation."

Quite illuminating is the case of *Wells v. Robinson Const. Co. et al.* (Sup. Ct. of Idaho (1932), 16 P. (2d) 1059). At page 1061, the Court said:

"The additional findings made by the district judge, from the same stipulation of facts, no other evidence of the facts having been presented, were not justified. The stipulation that at the time of his death deceased was engaged in plowing 'and had ahold of the handles of the plow at the time of said stroke' does not authorize the further finding by the district judge that special hazard resulted because the plow was constructed of steel or iron and was drawn by horses or tractor: or 'that it may be reasonably assumed that deceased was working in damp ground within a few feet of the horses, or a tractor, and that by reason of such condition and his position that his accident "grew out of and in the course of his employment"; or 'that judicial notice is taken that a plow is constructed more or less of steel and iron, and that in the operation of the same that either horses or a tractor is used, and further that it is generally assumed as a fact that both animals and steel or iron machinery are good conductors of electricity, thus increasing the hazard of the likelihood of lightning being conducted or communicated to a human being, who happens to be close by or within a few feet of said machinery and animals, a hazard which would not be assumed by a person not being in a like position; and hence, as a matter of law, an accident under such circumstances would be one "growing out of and in the course of his employment." As may be readily observed, these 'findings' by the district judge are not findings of fact, but inferences drawn from the stipulated facts that at the time of the accident deceased was plowing with his hands upon the plow handles. The inference is then drawn, from what had heretofore been inferred, that deceased was killed while working in a place of special hazard to lightning; an inference of fact based upon another inference of fact, which is not permissible. *Swetland v. New World Life Ins. Co.*, 35 Idaho, 109, 131, 206 P. 190 (on rehearing); *Johnson v. Richards*, 50 Idaho, 150; 163, 294 P. 507;

Common School District No. 27 v. Twin Falls Nat. Bank, 50 Idaho, 668, 673, 299 P. 662; State v. Cox, 298 Mo. 427, 250 S. W. 551."

The rule in the Federal courts appears to be similar. In *Lumbermen's Trust Co. v. Town of Ryegate*, 61 F. (2d) 14 (C. C. A. 9th Cir. 1932), at page 17 the Court said:

"\* \* \* Suffice it to say that where the agreed facts are the ultimate facts as distinguished from merely evidentiary facts, the ultimate facts thus agreed to have the force and effect of a special verdict. \* \* \*

For it would seem clear that the stipulation of the parties as to an ultimate fact so far as it goes is at least equivalent to an admission in the pleadings, and that where the admissions in the pleadings, together with the stipulated ultimate facts require judgment in favor of the plaintiff, it is an error of law reviewable on appeal if the court enter judgment for the defendant."

An extended discussion of the subject is contained in the opinion of the same court in *Kapiolani Maternity and Gynecological Hospital v. Wodehouse et al.* (1934) 70 F. (2d) 793, at pages 797ff. The court reviewed the decisions of many jurisdictions and concluded that where a stipulation fails to state all of the ultimate facts necessary to a decision, the court should not indulge in inferences but should dismiss the proceeding or remand it for further evidence or stipulation.

"To the same effect was *Elbee Chocolate Co. v. United States*, 64 F. (2d) 117 (C. C. A. 2nd, 1933).

The fact that the stipulation here may have been inexact and ambiguous does not justify inferring additional facts therefrom. In *Compania General de Tabacas de Filipinas v. Collector of Internal Rev.* (1929), 279 U. S. 306, at page 310, the Supreme Court said:

"The ambiguous phraseology of the stipulation failing to disclose precisely how the business was done, we may not speculate as to its actual character. See *Cochran v. United States*, 254 U. S. 387, 393."

It remains to consider some of the respects in which we believe the Court here has rested its decision on inferences or assumptions from the statements in the stipulations and has not treated the stipulations as constituting, in effect, the findings of fact upon the basis of which the questions of law must be determined.

(1) On the all-important question of the effect of the differences in prices upon petitioners' customers, the stipulation (Transcript 195-200 and especially 198-199) is extremely vague and indefinite and intentionally so so far as petitioners were concerned. The language there certainly does not constitute findings which would satisfy the requirements of a violation of the Clayton Act laid down by the courts in *International Shoe Co. v. F. T. C.*, 280 U. S. 291; *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, and other cases cited at pages 36 and 37 of our original brief. And we submit that the Court is not justified in inferring from the stipulation additional facts necessary to satisfy the holdings in those cases.

(2) On page 4, after discussing the effect of freight charges on the candy manufacturers and upon their competitive ability, the Court says:

"Consequently, some competitors have moved to Chicago, thereby decreasing their cost not only by reducing the actual cost of delivery but also by elimination of the fictional charge to which they were subjected when located in less favorably treated communities."

The use of the word "Consequently" implies that the Court is making the inference that it was the fact that certain customers were charged the freight rates from Chicago rather than those from Kansas City, which led them to move to Chicago. But there is no evidence that this was so. The stipulation, which is all there is in the record on the point, recites simply that *some* of the candy manufacturers at the cities named to which the freight rates are less from Kansas City than from Chicago were located in those

cities before petitioners' Kansas City plant was constructed and placed in operation, that "some formerly located at such cities have, since 1922, relocated in Chicago." (Tr. 199) There is not a word in the stipulation that the candy manufacturers who moved to Chicago did so *because* they were charged delivered prices based upon the freight rate from Chicago rather than that from Kansas City. We certainly would not have entered into a stipulation to that effect because we believe the facts are otherwise. Indeed if the government had found any witness who would have testified that he moved to Chicago because Corn Products opened a Kansas City plant while it continued to charge him a delivered price based on the Chicago freight rate, we certainly should have wanted to test his statement by cross-examination. We should have wanted to ask him how he became worse off than he was before the Kansas City plant was opened, so long as he was charged the same prices as formerly. It may perhaps be that some moved to Chicago to avoid all freight cost—a desire which would have been defeated under the Court's decision because when delivery was made to them of glucose brought to Chicago from Kansas City, it would be necessary to charge them a price including freight from Kansas City, rather than the flat Chicago price. The fact is, however, that the stipulation—and the only stipulation we were willing to enter into—states simply that *some* candy manufacturers have moved to Chicago since 1922 and is completely silent as to their motive in so doing,—whether it was to obtain better labor, a better plant, or cheaper cane sugar, or to be able to deliver to the Chicago market by truck or because the people concerned preferred to live in Chicago. Moreover the stipulated fact which we insisted on, that only "some" *con-* were located at these points before the Kansas City plant was placed in operation, negatives any idea that the freight factor in the delivered price was important in the competitive situation because it implies, as we understand is the fact, that others located at such points after 1922. Certainly those who did so did not regard the pricing practice as mitigating against their location. While those con-



cerns which located at these points when petitioners' only plant was at Chicago would have no reason, because of the freight factor, to move to Chicago when petitioners later opened a new plant, since both they and their competitors continued to pay delivered prices computed on the same basis as before.

(3) Throughout their opinion the majority correctly recognize that in so far as competition between customers is concerned discrimination in price is unlawful only when the discrimination prevents competition with a customer who "knowingly receives the benefit of such discrimination". Here those who are supposed to receive the benefit of the discrimination are those who are at Chicago and pay the flat Chicago price, and those who are nearer, freightwise, to Chicago than to Kansas City and pay delivered prices made upon the Chicago base price and the freight rates from Chicago. But there is not a word in the stipulation that these customers knew or believed that they were receiving the benefit of any price discrimination. There is not a word in the stipulation that any customer knows how the delivered price to someone else at some other destination is made or what it is. There is nothing to suggest that any one knows from what plant shipments are made to some one else or how the freight factor in the other's price compares with the actual freight. The Commission itself made no finding that any customer of petitioners who is supposed to receive a benefit does so "knowingly". It was, indeed, the lack of such a finding and the complete lack of evidence or stipulation to support such a finding which was one of the grounds upon which we urged that the conclusion of the Commission that Section 2(a) of the Act was violated, was an invalid and erroneous conclusion, contrary to the terms of the Act itself.

We certainly would never have stipulated that any customer of petitioners "knowingly" received the benefit of an alleged price discrimination or that any buyer even

knew there was any discrimination or knew the basis of the price paid by any other buyer.

Therefore, when the majority on page 7 state that

“a customer getting wares in or near Chicago at a delivered price including actual Chicago freight *well knew* that he was thereby buying at a proportionately lower price than his competitors in the various cities named were charged when they were supplied from Kansas City at the Chicago price plus a fictional freight from Chicago.”

the Court is laboring under a misapprehension as to the facts and the record, is going beyond the findings of the Commission and is adding facts to the stipulation which petitioners did not and would not have stipulated because we believe they are incorrect and could not be proved.

The foregoing examples indicate the error and the injustice to petitioners of the action of the Commission and the Court in embroidering upon the stipulation and adding inferences of their own when the stipulation was intended to state all of the inferences and factual conclusions upon which the parties were agreed. Still further examples will be shown under the following points.

If the Court believes that the stipulation may suggest the existence of other facts essential to a finding of a violation of the statute, we submit that instead of adding inferences and assumptions of its own to the stipulated statements, it should either take proof itself on these points or send the case back to the Commission for the taking of such proof:

## V.

**The Court's findings and conclusions as to “discriminations from booking practices” were in error and contrary to the evidence.**

On this phase of the case there were no stipulations and the decision must turn on the evidence. The Court has been misinformed as to the nature of the proof.

(1) There was no evidence whatever as to the effect of these various booking practices on competition between the customers receiving the alleged benefits and other customers. Neither is there in the record a word of proof that any of these customers knew that he was receiving the benefit of a price discrimination or was offered any different terms or prices than everyone else.

The Court has naturally failed to recall what we endeavored to make plain at the argument, that the Commission itself emphasizes this lack of evidence essential to a finding of a violation because it attempted to make good the lack by importing into this phase of the case the stipulation with respect to the basing point method which, however, was strictly limited to that.

(2) On page 7 of the opinion, in discussing the sales to tank wagon buyers, the Court labors under another misapprehension when it states:

"The price charged is the lower tank wagon price."

This is incorrect. When delivery was made to these tank wagon buyers they were charged the tank wagon differential in addition to the basic tank car price (Tr. 268).

(3) As for discrimination, the record shows that petitioners gave *all* tank wagon customers the same privilege of buying in carload quantities (Tr. 362), so that there actually was no discrimination either in price or terms.

(4) On page 8 of the opinion the Court denies our contention that the *prima facie* case of discrimination was rebutted by a showing that what petitioners did was done in good faith to meet competition, with the remark that the testimony to this effect "was general in character and vague in effect". Here we believe the Court has again been misinformed as to the state of the record.

With regard to the sales to tank wagon buyers, it is true that there is some testimony answering the Court's description, such as that "I know at that particular time

that things of that kind were being done throughout the industry" (Tr. 256). The tank car buyer to whom the most discussed alleged discriminatory sale was made was the Crystal Pure Candy Company. At a later hearing the Vice President of Corn Products Sales Company testified specifically that the sale to Crystal Pure Candy Company in tank car quantities was made to meet the competition of Hubinger (a competitor of Corn Products) who had offered to sell tank cars of glucose to that buyer (Tr. 348, 349). Another tank wagon buyer to whom sales of tank car quantities were made was Peanut Specialties. The testimony again is specific that previously Union Starch and Refining Company, another competitor of Corn Products, had shipped several tank cars to this buyer (Tr. 329).

On page 8 the majority conclude this portion of their opinion with the remark that

"if competitors' prices were arrived at in the same manner, to approve the defence, we would be driven to the inconsistent position of approving one evil practice because it was indulged in in order to meet a similar evil practice."

With all respect, we submit that here the Court is indulging in unsound reasoning and attempting to substitute its judgment for that of Congress as to what the statute should provide. For the statute definitely contemplates that when there is discrimination it is excused if it is the result of meeting competition in good faith. This is not a statute against discrimination per se, but against monopoly. It would defeat the purpose of the statute to hold that petitioners could not compete with others in their field by meeting their prices and terms.

Finally on this phase of the case, we submit that the Court should have upheld our contention, which it altogether failed to discuss, that the matters involved were not acts of discrimination in price, but were differences in terms, and not within the prohibition of the statute which is addressed only to the price feature of sales transactions.

**VI.**

**The Court erred in its decision with reference to the allowances to certain buyers of gluten feed and meal, and to the allowances to Keever Starch Company and Stein-Hall Company.**

Here again we submit, with due deference, that the Court has added to the stipulations (Tr. 186-193) and has assumed or inferred additional facts which the parties did not state and which we certainly would not have agreed to because we are convinced that they could not be proved.

As to both of these categories of alleged violations, it was stipulated that the allowances were "sufficient" to affect competition only "if and when reflected, in whole or in substantial part in resale prices." The stipulation contemplated, for example, that the allowances would not affect competition if they were distributed to stockholders.

Hence, to establish a violation of the statute, it was necessary that there be either additional proof or a further stipulation that the allowances actually were "reflected, in whole or in substantial part" in the resale prices. But the government produced no such proof, and we did not so stipulate and would not have done so because we think such a stipulation would have been contrary to the fact.

For the Court, therefore, to assume facts not stated in the stipulation gives to it an effect not intended, leads to an unwarranted conclusion and causes injustice to petitioners.

**VII.**

**The decision is inconsistent with the decision in the *Staley* case and unfairly turns upon differences in language of negotiated stipulations.**

The majority decision in the *Staley* case was the result of concurrence by Judge MAJOR with Judge MINTON's con-



clusion that Staley adopted the basing point price system in good faith to meet the prices of its competitors and that this rebutted the Commission's *prima facie* case of price discrimination.

Judges KERNER and LINDLEY in our case conclude

"No such question is presented to us here, for the present record discloses no such contention and no such rebutting facts."

The Court must appreciate from its experience with these two cases that such a difference is not a difference in actual facts but merely in the terms of negotiated stipulations. For Corn Products and Staley are both units of a highly competitive industry, and there can be no dispute on the facts that each must meet the prices of the other and both must meet the prices of the few other units of the industry if they are to do business.

Moreover, while we do not, of course, seek to detract from the success of Staley in this feature of their case, we cannot refrain from pointing out that to all of the points referred to on page 3 of the decision in the *Staley* case, which likewise include many of the destinations listed by the Commission in our case, Staley's plant at Decatur is actually nearer than is Chicago and the freight rate from Decatur is less than the freight rate from Chicago. Consequently, while Staley may have adopted the basing point price method because that was the going method in the industry, the result as to these particular destinations with which the proceeding was concerned was that Staley, in selling at a delivered price based upon Chicago plus freight from Chicago, secured a freight pick-up instead of meeting prices which included lower freight factors than the freight rates from Staley's plant at Decatur.

Judge MINTON on page 7 says that

"It is the use of the (basing point) system that is complained of. \* \* \* The companies' competitors were using the system when the companies entered the field. The companies merely followed the system and practices which had been established by their competitors."

Therefore, he concludes that they were justified in charging at all destinations delivered prices made up of Chicago base prices plus freight from Chicago, although actual freight charges from Decatur were less.

The Staley plant at Decatur was established in 1920. Corn Products opened their plant at Kansas City in 1922. Prior to that time their own practice had been to charge delivered prices made up of its price at Chicago plus freight from Chicago. They were certainly as much entitled to continue to quote delivered prices on this same basis after they opened their Kansas City plant in 1922 as was Staley to adopt this system.

### VIII.

#### **The Court erred in its findings and conclusions as to the Curtiss transaction.**

We will not extend this petition to discuss this phase of the matter in detail but, rather, submit that the Court erred in not adopting the views of the facts and the law contended for in our original brief here. However, there are certain features of the Court's opinion which call for brief comment.

The Court refers to the expenditures by Corn Products of some \$750,000 in *three* years and of Curtiss' expenditure of "some \$200,000 or more a year on the project" (p. 10). However, the \$750,000 spent by Corn Products was spread over *four* rather than three years (Tr. 297, 483) and the testimony was that the total advertising expenditures of Curtiss stood in the ratio of at least *two* to one to those of petitioners (Tr. 61, 177). This may have an important bearing on the charge that the arrangement was not offered to others on "proportionately equal terms". For it appears that in the matter of advertising Curtiss was in a class by itself, and there were no others from whom Corn Products could have obtained a similar amount and kind of advertising (Tr. 300, 311). Another large candy company with extensive advertising was Mars, and the evi-

dence shows that petitioners not only offered a similar arrangement to Mars but endeavored to sell Mars the idea, but without success (Tr. 62).

For it must be understood, contrary to the apparent impression of the Court, that Corn Products was not concerned with advertising Curtiss candies for Curtiss. It was buying advertising of dextrose for itself.

There is no proof that there were other candy companies who were able to provide similar advertising facilities or were willing to do so. If one needs a large horse, it is not discrimination to make no bids on a small horse, or to refuse a half a horse or a dog.

The testimony shows affirmatively that petitioners were willing to enter into a similar arrangement with any candy company willing to provide the same kind of advertising service for dextrose (Tr. 179-180). This is not contradicted. The government developed the names of other concerns competing with Curtiss and purchasing dextrose from petitioners (Tr. 301). But there is not a word of proof that any of them desired to enter into such an arrangement, was able to do so, or had been refused.

We submit that even if, contrary to our contentions, Section 2(e) is applicable to such a situation, the Court should conclude that the Commission's finding of a violation was entirely arbitrary and without support in the evidence.

### **Conclusion**

We believe that the Court erred:

1. In giving to the Robinson-Patman Act an effect contrary to the proved intention of Congress and not warranted by the language used;
2. In giving to the stipulations of fact effects contrary to the understanding and intention of the parties by adding to the stated facts additional facts assumed or inferred by the Court;

3. In proceeding on erroneous impressions of the evidence;

4. In various legal conclusions.

WHEREFORE petitioners pray that the Court may grant a rehearing and may reconsider its decision herein in the respects indicated; that after such rehearing and reconsideration it may either modify its previous decision and set aside the order of the Commission herein, or that it may itself hear evidence or return the proceeding to the Commission for the receipt of proof on the matters dealt with in the various stipulations and the inferences of the Court thereupon; and that, pending rehearing, reconsideration and determination, the mandate of the Court may be stayed.

Respectfully submitted,

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July 19, 1944.





*Answer to Petition for Rehearing.*

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Endorsed: Filed July 21, 1944. Kenneth J. Carrick,  
Clerk.

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And afterwards, to-wit: On the sixteenth day of August, 1944, there was filed in the office of the Clerk of this Court, an Answer to Petition for Rehearing, which said Answer is in the words and figures following, to-wit:







# In the United States Circuit Court of Appeals for the Seventh Circuit

No. 8116

CORN PRODUCTS REFINING COMPANY, A CORPORATION, AND  
CORN PRODUCTS SALES COMPANY, A CORPORATION, PETI-  
TIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

## RESPONDENT'S ANSWER OPPOSING PETITION FOR REHEARING

Come now counsel for the Federal Trade Commission, respondent herein, and oppose the petition for rehearing filed by petitioners on July 21, 1944. The grounds for such opposition are as follows:

By way of general and preliminary observation it is submitted that petitioners make out no case justifying any reconsideration of the Court's decision because they do little more than restate and reiterate the various positions previously taken in their briefs and argument on the merits and which positions have already received full consideration by the Court.

Taking up seriatim the eight points advanced by petitioners the following specific answers are made:

1. Petitioners assert that the decision holding that differences in price arising from the basing point method are discriminatory "is contrary to the language of the statute and does violence to the Congressional intention and to the assurances given to procure the passage of the Robinson-Patman Act" (Petition, p. 1). This assertion is made in the face of the fact that two of the three judges sitting in the present case, as well as two of the three judges sitting in the *Staley* case, were agreed



that the language of the statute does not exempt from its condemnation of discriminatory prices those price discriminations which result from the basing point method and that the intention of Congress is to be gathered from the terms of the statute rather than from expressions of individual members of Congress. Even Judge Major, who alone subscribed to the position here advanced by petitioners, stated in his concurring-dissenting opinion in the *Staley* case that "the strict literal language of Section 2 (a) makes it appear that the system has been proscribed" and that "a superficial view of the system is calculated to lead to its condemnation." However, as the dissenting opinion of Judge Evans in the *Staley* case makes clear, the position of Judge Major involves the conclusion that Congress did not mean what it said and therefore that Congress said what it did not mean. It also involves the assumption of ~~judicial~~ power to say what Congress did mean in lieu of what it said and thus would make the Court the law-making rather than the law-construing body.

Petitioners' contention is equivalent to urging that in a statute which condemns price discrimination generally the failure to condemn a particular form or pattern of price discrimination shows an intent to exempt that form or pattern from operation of the statute. This is to attribute to Congress the contradictory intention of expressly prohibiting discrimination without any such exemption and at the same time of impliedly providing for such an exemption. It attributes to Congress the stultifying intention of prohibiting discriminations that do not make due allowance for differences in cost of delivery and at the same time of legalizing a system that is designed to prevent and has the effect of preventing the making of such allowances. For there is no way by which discrimination in delivered prices can be prevented except by requiring that due allowance be made for differences in cost of delivery.

Petitioners incorrectly state the effect of the Court's decision when they say that it requires all sales to be made on an f. o. b. factory basis. The decision merely requires that if and when delivered prices are made they shall make due allowance for differences in cost of delivery in keeping with the statutory

provision. If the meeting of such statutory requirement results in a uniform net at the factory, that still does not require sales to be made on an f. o. b. factory basis. Even though sales were to be made on such a basis the statute would permit the same exemptions with regard to differences in cost as though sales were made on a delivered price basis. Petitioners are simply arguing that they are entitled to vary systematically their net factory prices so that they may absorb the benefits of their lower costs of delivery to some points and also escape the burdens of their higher costs of delivery to other points. If the statute were to be taken as prohibiting neither such a variation in net factory prices nor a denial of due allowance in delivered prices for differences in cost of delivery, although the necessary adverse effects on competition are present, then it would appear that the statute does not prohibit discrimination either in f. o. b. factory prices or in delivered prices.

Petitioners cite *American Column & Lumber Company v. United States*, 257 U. S. 377, in support of their claim of judicial approval. The legality of the basing point system was not an issue in that case and the decision involved no approval of it or of any of the other price-fixing practices there condemned. The status of the system under the Sherman Act is an entirely different question than the status of price discrimination arising from it under the Clayton Act as amended by the Robinson-Patman Act.

Petitioners argue that the Court's decision will result in discrimination wherever they "would have to charge different prices based upon the actual freight in each instance" (petition p. 3). This overlooks the obvious fact that the statute exempts discrimination "based upon the actual freight in each instance" because it exempts price differences that make only due allowance for differences in cost of delivery.

In urging again the legislative history of the Robinson-Patman Act as indicating an intention of Congress at variance with the broad and express terms of the statute, petitioners state (petition p. 2) that the words "discriminate in price" appeared also in the old Clayton Act of 1914 and that they had never been held applicable to price differences resulting from the

basing point system. They forget in this connection the 1924 decision of the Federal Trade Commission to the contrary in the *Pittsburgh Plus* case (8 F. T. C. Decisions 1). Repeating the fact that the above-quoted words appeared also in the Clayton Act, petitioners impliedly argue (petition p. 4) that the debates of 1936 are relevant in determining the Congressional intent of 1914. This was the sort of argument which was rejected by the Supreme Court in the recently decided case of *United States v. Southeastern Underwriters Association* and to which Judge Evans referred in his dissenting opinion in the *Staley* case. If it were necessary to consider the debates, which it is not in the absence of ambiguity in the terms of the statute, the debates to be considered would be those of 1914. Those debates, like those attending the passage of the Sherman Act in 1890, clearly showed the intent of Congress to reach all forms of the evil practices covered by the terms of the statute. The evils of territorial or geographical discrimination in price, except those accounted for by differences in cost of transportation, were the evils chiefly aimed at by the Clayton Act's prohibition of price discrimination.

We therefore submit that the opinion of the majority of the Court construes the statute in exact accordance with the expressed intention of Congress and does not, as petitioners contend, give the statute a meaning and effect "directly contrary to the intention of Congress."

2. The second point advanced by petitioners is that the Court failed to take into account the consequences of petitioners having two plants, one in Chicago and one at Kansas City.

Petitioner's argument on this point is equivalent to a contention that even though Congress had intended not to exempt price discriminations resulting from the basing point practice, there should be a special exemption for petitioners because they have two plants. The lack of logic in such a contention is plain and palpable. If it be conceded by petitioners, even *arguendo*, that the legislative history does not override the plain language of the statute, then on what legal or logical foundation does the two-plant argument rest? The

distinction between sellers with one and those with two or more plants did not figure at all in the Congressional debates. So there is nothing left except some vague idea that while Congress may have intended to prohibit discrimination by a company with one plant, it either did not or could not interfere with discrimination by a company with two plants. The argument that the making of a sales contract would create still another form of implied exemption from the statute is plainly puerile.

It is further argued that the only way by which price discrimination can be avoided by a company with two plants is to ignore "the actual point of shipment" and "the freight charges actually paid." It is also urged that it is "far more important" that "all buyers at a common destination" should be "placed upon an equality" than that "buyers at different destinations," having different freight rates, "should pay prices related to each other precisely as are the freight charges actually paid" (petition p. 7). The history of the Clayton Act shows that discrimination between buyers at different places was the chief form of discrimination to be proscribed and there is no hint of any different intention in the debates on the Robinson-Patman Act. So the argument is really for a narrowing of the express terms of the Act to provide a special and implied exemption with nothing to imply it from except petitioners' assertion that it is "far more important" to protect buyers at the same destination than those at different destinations. In other words, petitioners' method of allegedly protecting buyers against discrimination is better than that prescribed by Congress, and if they conflict petitioners' method should prevail. Moreover, petitioners overlook the fact that the statute also gives protection against discrimination among buyers at the same destination and makes it possible for them also to have the benefit of due allowance for differences in cost of delivery without either the seller or buyer violating the statute. Buyers at the same destination do not necessarily have the same cost of delivery; one may be served by rail and another by truck.

Petitioners' final argument on this point (petition p. 7) is that they are in the same position as the Staley Company which

was held by the majority opinion in the *Staley* case to have been meeting the equally low price of competitors in good faith and that "in substance, Corn Products is likewise meeting its own delivered price when it ships from one plant rather than another." This contention was not made before and for rather obvious reasons. To suggest that Corn Products at Chicago and Corn Products at Kansas City were competitors within the meaning of the statute, and that therefore the Kansas City plant was in good faith meeting an equally low price of the Chicago plant when it added \$380 per carload consisting of the "phantom freight" from Chicago to Kansas City, goes even further than what Judge Evans in the *Staley* case characterized as "bordering on the absurd." It runs directly contrary to the opinion of the Court in the instant case to the effect that "the inclusion of a fictional cost of delivery, having no justification in fact, in itself suggests, upon the part of the manufacturer, arbitrary fixation of prices discriminating illegally as between competitive customers."

3. Petitioners' third point is that the Court erred "with regard to the consequences of alleged discrimination which must be shown in order to establish a violation of the Act."

Petitioners assert there is no proof of substantial competition or of reasonable probability that the discrimination between Kansas City and Chicago buyers would "substantially impair any buyer's ability to compete in the market where he seeks to sell" (Petition p. 9). While conceding that reasonable probability of injury to competition is legally sufficient as distinguished from actual injury, petitioners attack their own stipulation of the facts as insufficient proof of reasonably probable injury. Yet by the stipulation it was conceded that candy manufacturers located in the various cities discriminated against and in Chicago were in competition with each other, that manufacturers so discriminated against had higher costs on a raw material comprising up to 90% of the finished product, that those paying the higher prices "may attempt to recover such increased costs by increasing the price of such candies or make only selected sales on a nonprice or other basis," and that in either event their profits would be reduced in the absence of



other and offsetting cost factors through a reduced volume of sales or through absorption of higher sirup costs in selling at competitive prices. The stipulation also specifically concedes the fact that "the result may be to diminish the ability of those paying the higher prices for sirup to compete with those paying the lower prices" (Tr. p. 199).

Thus, although petitioners have stipulated these and other facts regarding the reasonable probability of competitive injury by using in the stipulation the statutory words "may be," they now attack the stipulation as too vague to constitute evidence of the reasonable probability which they concede is the statutory standard. They say (petition p. 15) that "on the all important question of the effect of the differences in prices upon petitioners' customers, the stipulation \* \* \* is extremely vague and indefinite and intentionally so so far as petitioners are concerned."

Although conceding that reasonable probability of competitive injury is the statutory standard, petitioners nevertheless contradict that concession by arguing (petition p. 9) that a violation cannot be established "in the absence of proof that some particular buyers *were* prejudiced and that their competitive ability *was* impaired in relation to some other particular buyers; or in the absence of expert proof that price differences *necessarily have* this effect." [Italics added.] The same contradiction appears in the sentence on the same page to the effect that there is no proof that the difference in freight rates from Kansas City and that from Chicago "*has or will* substantially impair any buyer's ability to compete in the market where he seeks to sell"; also on page 8 of the petition in the sentence stating that "it *must* appear, as the statute specifically provides \* \* \* that the discrimination *will have* one of the consequences sought to be prevented. [Italics added.]

4. Petitioners' fourth point is that the Court "erred in making unwarranted inferences from the stipulations of fact."

In their argument on this point petitioners do more than challenge the making of "unwarranted" inferences; they challenge the right of either the Commission or the Court to draw

any inferences from the stipulated facts. They say (petition, pp. 10-11) that "the Commission was obligated to adopt as its findings of fact upon the particular matter in hand the stipulation itself and was not entitled to add to that stipulation other inferences of its own. We believe that the same limitation applies to this Court." Petitioners cite a number of cases, most of them in State courts, in support of that contention. All of them are inapplicable, however, to an administrative agency that Congress has clothed with power to make findings as to the facts which "if supported by evidence shall be conclusive," and to an agency with "the trained judgment of a body of experts 'appointed by law and informed by experience' " (*Humphrey's Executor v. United States*, 295 U. S. 602, 624). Moreover, petitioners' position is in direct conflict with the decision of the Supreme Court in *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 52. There also, the facts had been stipulated and the Commission drew inferences from them. The Court said:

"The Circuit Court of Appeals held that the stipulated facts do not sustain the Commission's finding that the use of association prices by members outside the State where they are located has a tendency to lessen competition and to fix uniform prices in such territories. The validity of the inference or conclusion drawn by the Commission and of this part of the order depends upon the proper estimation of the facts stipulated. The language specifically relating to such use of the agreed prices if considered alone might possibly be deemed insufficient. But the Commission is not confined to so narrow a view of the case. That part of the stipulation properly may be taken with all the admitted facts and the inferences legitimately to be drawn from them (supra, p. 61).

Again the Court said:

The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the Commission (*ibid.*, p. 63).

The Court then proceeded to uphold the inferences drawn by the Commission. Since it could not do this without itself drawing the same inferences, this would seem to meet the contention of petitioners here that this Court is not entitled to draw inferences from the stipulated facts. The real purport of petitioners' objection here is that the Court did not see fit to draw the same inferences that petitioners think should be drawn.

After thus challenging the right of either the Commission or the Court to draw any inferences from the stipulated facts, petitioners proceed to argue that certain inferences so drawn were not warranted. First they repeat the challenge made under their second point to the effect that the probable consequences of the stipulated discriminations could not be inferred from the stipulated facts (petition p. 15). Some of the facts supporting such inference were stated under No. 2 herein, including the fact that petitioners had stipulated that "the result may be to diminish the ability of those paying the higher prices for sirup to compete with those paying the lower prices" (Tr. p. 199). It is a logical absurdity for petitioners to contend that no logical inference of "reasonable probability" of consequences can be drawn from that and the other stipulated facts. It might even be said that petitioners stipulated the very inference to which they now object as unwarranted.

Petitioners next object to the soundness of the inference drawn by the Court to the effect that some candy manufacturers moved to Chicago in order to escape the adverse effect of the discriminations. One obvious answer is that having stipulated that "the result may be" to adversely affect the ability of those paying the higher prices to compete with those paying the lower, it becomes a perfectly logical inference that candy manufacturers who moved from cities discriminated against to Chicago where petitioners' plant did not discriminate, were influenced to do so by such discrimination. The fact that such stipulated changes of location were part of the context setting forth other consequences of the discriminations and that such charges have no other conceivable relevancy to the issues, also evidences the soundness of the challenged inference. Petitioners conceded in their brief (p. 47) that "a very important induce-

ment" to build their Kansas City plant was to secure "an added profit" represented by the lesser transportation cost. From this it may be logically inferred that the avoidance of providing that extra profit constituted an inducement for candy manufacturers to move to Chicago. For such a move meant a saving of \$380 per tank car in "phantom freight" to the Kansas City candy manufacturer. Petitioners nevertheless argue that the freight factor in the delivered price was not competitively "important" (Petition p. 16). Petitioners go outside the record (pet. p. 16) for their assertion in that connection that some candy manufacturers located after 1922 at the points discriminated against.

The argument is fallacious that candy manufacturers would have had the same delivered cost if there had been no plant of petitioners at Kansas City. That is only another way of arguing that petitioners are entitled to discriminate by refusing to make due allowance for differences in cost of delivery and of denying the stipulated fact that "the result may be to diminish the ability of those paying the higher prices for syrup to compete with those paying the lower prices." The fallacy is also apparent when it is considered that the Kansas City candy manufacturer can compete even in Kansas City only after overcoming the \$380 per carload "phantom freight" that petitioners charge him for glucose over and above what the Chicago candy manufacturer pays. As the Kansas City manufacturer reaches out toward Chicago his freight on candy increases as his Chicago competitor's freight on candy decreases and this natural disadvantage is added to the handicap of his artificially higher glucose costs. When he reaches Chicago he can compete with the Chicago candy manufacturer only after overcoming the disadvantage of \$380 per car "phantom freight" on glucose plus the full freight on candy from Kansas City to Chicago. By contrast the Chicago candy manufacturer has neither actual nor "phantom freight" on glucose and no freight on candy in Chicago. Nor has he any freight on glucose to consider when selling candy in Kansas City.

Petitioners' third contention under this point is that the Court erred in inferring that customers receiving the benefit of the discriminations do so "knowingly." The answer to this contention is found at page 44 of our brief. It is preposterous as there stated to suppose that buyers do not know how delivered prices are calculated and do not know that some are paying more than warranted by differences in cost of delivery in view of petitioners concession in their brief (page 22) that in so pricing they "do only what all members of the industry do." Petitioners are plainly in error, however, in stating (petition p. 17) that the adverse effect of discrimination on competition among customers "is unlawful only" when competition is prevented with a customer who "knowingly" receives the benefit of the discrimination. Such a construction fails to take into account the language of the statute which provides *in the alternative* that discrimination is unlawful "where the effect may be substantially to lessen competition \* \* \* in any line of commerce." Whether the buyer has knowledge or not is immaterial under that provision. The adverse effect on the commerce of candy manufacturers as a class was stipulated in substance by petitioners and the Commission so found (Tr. pp. 199, 474). It was therefore unnecessary to make a finding that buyers "knowingly received" the benefit which finding, as petitioners point out, was not made by the Commission (Cf. pet. p. 17-18). Petitioners fall into this same error when they argue (petition p. 9) that "some particular buyers" must be prejudiced and their competitive ability "impaired in relation to some other particular buyers." Proof of an adverse effect on competition in a "line of commerce" meets an independent requirement of the statute, and a higher one than proof regarding "particular buyers" and their knowing receipt of the benefits of discrimination.

5. The fifth point advanced by petitioners in their petition for rehearing is that the Court's findings and conclusions concerning discriminations resulting from "booking" were "in error and contrary to the evidence."



Under this petitioners make four contentions which neither separately nor collectively are sound and sufficient reasons for rehearing. All but one of them were unsuccessfully urged upon the Court in brief and argument. Coupled with the stipulated fact that in selling cheap candy of which glucose may comprise 90% "a small fraction" of a cent per pound would turn the business, is the unquestioned fact that the "booking" discriminations alone amount to  $\frac{1}{2}$  cent or more on glucose, sufficient in themselves to determine the outcome of price competition among candy manufacturers. Nor is the fact questioned that such discriminations are superimposed on the discriminations resulting from the basing point system and that the latter range up to  $\frac{1}{4}$  of a cent per pound. It was stipulated as to these last that "the result may be to diminish the ability of those paying the higher prices for sirup to compete with those paying the lower prices" (Tr. p. 199). Petitioners' objection thus reduces itself to a contention that the  $\frac{1}{2}$  cent per pound booking discrimination when added to the  $\frac{1}{4}$  cent a pound basing point discrimination is mathematically insufficient to decide the sale of candy containing up to 90% glucose, although it is stipulated that "a small fraction" of a cent per pound difference in candy prices will so decide. The question whether it is necessary that customers receiving the benefit of "booking" discriminations know that they are receiving such benefit was discussed in another connection (Ante p. 11). Moreover, the terms on which petitioners will permit "booking" by all customers when the price of glucose is advanced are publicly announced and are well known to the trade. Favored customers who are permitted to "book" orders after expiration of the announced 5-day order period or to take delivery after the announced 30-day delivery period obviously knew they were being given a special privilege not obtainable under the general announced terms.

Petitioners next state that the Court is "incorrect" in saying that as to a certain form of "booking" discrimination "the price charged is the lower tank wagon price" (petition p. 19). This is apparently a misprint, as the opinion states that "the price

charged is the lower tank car price" and obviously it is such statement that is challenged as incorrect. The Commission made no finding on that precise point, possibly because the record concerning it is confused and contradictory. However there is considerable evidence to support the Court's statement (Tr. pp. 370, 371, 372, 373). In any event the point is immaterial because it involves merely the question whether additional discrimination occurred between tank wagon buyers because some of them may have been given the benefit of the tank car price. There has been no challenge by petitioners of the Commission's findings (Tr. pp. 472, 473) that during the period in question, covering two general price advances in the spring of 1937, petitioners "booked" orders from two specifically named customers in tank car lots at the tank car price in effect before the first price advance became effective, that deliveries were made on such "bookings" over a period of 90 days instead of the regular 30-day period required of other buyers under petitioners' announced policy and practice, that deliveries were made in tank wagon lots to one of these customers because it had no facilities for taking tank car delivery contemplated by the booking at the old tank car price, and that as a result these two favored customers were given the benefit of a base price of \$3.04 per cwt. during a period when other tank wagon buyers were paying the equivalent of a base price of \$3.54 and \$3.59. Whether they were also being given the additional advantage of the ten cents differential between tank car and tank wagon prices is obviously unimportant.

As to petitioners' reiterated claim that the evidence showed good faith to meet an equally low price of a competitor in the "booking" discriminations among tank wagon buyers, the information as to the alleged competitive offer of Hubinger to the Crystal Pure Candy Co. came to the executive officer witness through an unnamed salesman and there was no way by which the witness or his office could find out whether it was true (Tr. pp. 349-350). The competition of Union Starch and Refining Co. for the business of Peanut Specialties took place in the summer of 1936 while petitioners' discriminations took place in

March, 1937 (Tr., p. 329.) Everything advanced in this connection has already received consideration by the Court and warranted the Court's characterization of such evidence as "general in character and vague in effect." In the absence of an affirmative showing of good faith by petitioners to meet an equally low price of a competitor, it is unnecessary to debate what would be the legal effect of such a showing. But as the Court evidently saw, if each competitor in the industry may discriminate because every other competitor does, then the law becomes progressively powerless as discrimination becomes more and more prevalent.

Petitioners renew their contention that the "booking" discriminations did not involve differences in price but only differences in terms. They make this contention despite the fact that in their brief (p. 52) they conceded that "the result may be that after a price increase one customer is purchasing goods for which he is paying the new and higher price and another customer is purchasing goods through the exercise of an option but purchasing at the old low price."

6. Petitioners' sixth point is that the Court erred in its decision with reference to discrimination among buyers of gluten feed and meal, and among buyers of starch.

When petitioners say (petition, p. 21) that there must be "either additional proof or a further stipulation that the allowances actually were reflected in whole or in substantial part in the resale prices," they again resort to the theory of actual as distinguished from reasonably probable injury to competition, between which concepts they had alternated under the third point in their petition (Ante p. 7). The primary dictionary meaning of "if and when" support the conclusion that competitive injury is reasonably probable; only secondary meanings give any support to petitioners' contention that they imply only a possibility.

7. Petitioners' seventh point is that the decision is "inconsistent" with the decision in the *Staley* case and "unfairly turns upon differences in language of negotiated stipulations."

Apparently petitioners want their case decided on the *Staley* record instead of their own stipulation of facts regarding basing

point discriminations. They claim that the difference in the facts "is not a difference in actual facts but merely in the terms of negotiated stipulations" (petition p. 22). Counsel for the Commission might just as logically suggest that where contents of the Staley stipulation are more favorable to their position the Court should reach over into the Staley record for facts or conclusions adverse to the Corn Products Co. For example would petitioners consent that the Court might consider as applicable to them the stipulated fact adverted to by Judge Minton in the Staley opinion that at times they had "increased \* \* \* their price \* \* \* for delivery in all markets by the same amount per hundredweight *without and independent of any similar and prior action by competitors*"? [Italics added.] In reality this argument of petitioners is an indirect method of seeking the benefit of the majority opinion in the *Staley* case as to good faith in meeting the equally low price of competitors. Success in such effort could be accomplished only on the theory that their Kansas City plant was a competitor of their Chicago plant within the contemplation of the statute and consequently entitled to discriminate to meet the Chicago plant's equally low (and equally high) price. Again one thinks of Judge Evans' characterization of the less extreme Staley contention on this point as "bordering on the absurd."

Petitioners are aware, as shown by their quotation (petition p. 22) from Judge Minton's opinion; that Staley's competitors were using the system when Staley entered the business and that Staley "merely followed the system and practices which had been established by their competitors." Yet they impliedly argue that the same facts are applicable to them whose Chicago plant was established in 1910.

While seeking the benefit of the Staley record as a basis for urging good faith in meeting the equally low prices of competitors petitioners nevertheless attempt to distinguish their situation from that of Staley on the matter of "phantom freight." They point out what they conceive to be a differentiating factor in their favor. They inferentially suggest that Staley was in a weaker position in that regard and that since

Staley's defense was accepted by the majority opinion, petitioners' argument should be accepted, *a fortiori*. The suggested differentiating factor is that Staley "in selling at a delivered price based upon Chicago plus freight from Chicago, secured a freight pick-up instead of meeting prices which included lower freight factors than the freight rates from Staley's plant at Decatur" (petition p. 22). By the same token petitioners "secured a freight pick-up" that was far larger in amount than that secured by Staley (40 cents per cwt. as against 18 cents) "instead of meeting prices which included lower freight factors" than the freight rates from the Corn Products plant at Chicago. The "added profit" represented by the lesser transportation cost and "the transportation pick-up" was conceded, in petitioners' brief as being "a very important inducement" in building their Kansas City plant (Petitioners' brief p. 47).

As to petitioners' contention that the decisions in the *Staley* and *Corn Products* cases are "inconsistent," it may logically be concluded that if the Court in the *Staley* case had had before it the same record as in the present case, with no contention being made that the record contained evidence of good faith to meet equally low prices of competitors and the record in fact containing no such evidence, then a majority of the *Staley* court (Judges Minton and Evans) would have decided just as Judges Lindley and Kerner have decided the present case. While it is an anomalous situation that one member of the industry can discriminate because his good faith was thought to affirmatively appear and a competitor cannot discriminate because his good faith does not affirmatively appear, it does not follow that the anomaly should be removed by making the latter decision conform to the other.

8. The last point advanced by petitioners is that the Court erred in its findings and conclusions as to the Curtiss transaction.

Petitioners state (petition p. 24) that "it must be understood, contrary to the apparent impression of the Court, that Corn Products was not concerned with advertising Curtiss



candies for Curtiss. It was buying advertising of dextrose for itself." In addition to the fact that the advertising of Curtiss candies and of dextrose were inseparably blended and that the dextrose was not identified in the advertising as petitioners' product, the above-quoted statement is contradicted by some of petitioners' statements in their brief. They state (brief p. 59) that their large contributions to Curtiss advertising were made "not because it bought dextrose from petitioners and as a purchaser of such dextrose, but because it was a candy company with a great distribution and a very large national advertising program."

The argument that it is not discriminatory to make no bids on a small horse if one needs a large horse is equivalent to arguing that if one needs to restrict his furnishing of special services or facilities to large purchasers then he is excused from the statutory requirement that such services or facilities shall be "accorded to all purchasers on proportionally equal terms."

Petitioners further say (petition p. 24) that there is no contradiction of their claim that they were willing to make a similar arrangement with other candy companies and that there is no evidence that any had been refused. They overlook the evidence and the Commission's finding that petitioners "have instructed their salesmen to advise customers to whom they sell products to be used in the manufacture of confectionery that they do not contribute to the advertising done by customers". (Tr. pp. 162, 485). Petitioners close this part of their petition with the generalization that even though the statute is applicable, the Commission's finding of a violation "was entirely arbitrary and without support in the evidence." No specifications are given. As pointed out in our brief (p. 54), petitioners nowhere take specific issue with the Commission's findings of fact on this subject or point to any particular finding which they contend is not supported by adequate, competent evidence, and their own statement of the facts (their brief pp. 10-13) does not conflict with the Commission's findings.

## CONCLUSION.

Counsel for the Commission submit that petitioners have presented no substantial grounds for a rehearing and reconsideration of the decision of the Court and that in reality the soundness of such decision is further confirmed by the showing made. It is therefore submitted that the petition for rehearing should be denied.

Respectfully submitted.

FEDERAL TRADE COMMISSION,

By:

W. T. KELLEY,

*Chief Counsel.*

WALTER B. WOODEN,

*Assistant Chief Counsel.*

WASHINGTON, D. C., August 4, 1944.

*Order Denying Rehearing.*

593

Endorsed: Filed August 16, 1944. Kenneth J. Carrick,  
Clerk.

And on the same day, to-wit: On the sixteenth day of  
August, 1944, the following further proceedings were had  
and entered of record, to-wit:

Wednesday, August 16, 1944.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Hon. Otto Kerner, Circuit Judge.

Hon. Walter C. Lindley, District Judge.

Corn Products Refining Company,  
a Corporation, and Corn Prod-  
ucts Sales Company, a Corpora-  
tion,

*Petitioners,*

8116

*vs.*

Federal Trade Commission,

*Respondent.*

On Petition for Re-  
view of Order of  
the Federal Trade  
Commission.

It is ordered by the Court that the Petition for a rehear-  
ing of this cause be, and it is hereby, denied.

And afterwards, to-wit: On the twenty-first day of Au-  
gust, 1944, there was filed in the office of the Clerk of this  
Court, a Motion to Stay Issuance of Mandate, which said  
motion is in the words and figures following, to-wit:

*Motion to Stay Mandate.*

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Corn Products Refining Company,  
a Corporation, and Corn Prod-  
ucts Sales Company, a Corpora-  
tion,

*Petitioners,*

Case No. 8116.

*vs.*

Federal Trade Commission,

*Respondent.*

## MOTION FOR STAY OF MANDATE.

Now come Corn Products Refining Company, a corpora-  
tion, and Corn Products Sales Company, a corporation,  
petitioners in the above-entitled cause, and respectfully  
move the Court to enter an order that issuance of the man-  
date of this honorable Court upon its order denying the  
petition of said petitioners for a rehearing of the above-  
entitled cause be stayed pending application of said peti-  
tioners for writ of certiorari to the Supreme Court of the  
United States.

Corn Products Refining Company,  
a corporation,  
Corn Products Sales Company,  
a corporation,

By William S. Jameson,  
Office and P. O. Address,  
315 Grand Central Station,  
Chicago 7, Illinois.

Parker McColester,  
Office and P. O. Address,  
25 Broadway,  
New York 4, New York,

*Attorneys for Petitioners.*

Frank H. Hall,  
Office and P. O. Address,  
17 Battery Place,  
New York 4, N. Y.,

Sidney S. Coggan,  
Lord, Day & Lord,  
Office and P. O. Address,  
25 Broadway,  
New York 4, N. Y.

Endorsed: Filed August 21, 1944. Kenneth J. Carrick,  
Clerk.

*Order Staying Mandate.*

595

And afterwards, to-wit: On the twenty-third day of August, 1944, the following further proceedings were had and entered of record, to-wit:

Wednesday, August 23, 1944.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

Corn Products Refining Company,  
a Corporation, and Corn Prod-  
ucts Sales Company, a Corpora-  
tion,

*Petitioners,*

8116

*vs.*

Federal Trade Commission,

*Respondent.*

On Petition for Re-  
view of Order of  
the Federal Trade  
Commission.

On motion of counsel for petitioners, it is ordered that the issuance of the mandate of this court in this cause be, and it is hereby, stayed pursuant to rule 25 of the rules of this Court.

And afterwards, to-wit: On the eighteenth day of September, 1944, the following further proceedings were had and entered of record, to-wit:



Monday, September 18, 1944.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.  
Hon. Otto Kerner, Circuit Judge.  
Hon. Walter C. Lindley, District Judge.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Corn Products Refining Company,  
a Corporation, and Corn Prod-  
ucts Sales Company, a Corpora-  
tion,

*Petitioners,*

Case No. 8116.

*vs.*

Federal Trade Commission,

*Respondent.***FINAL DECREE MODIFYING, AFFIRMING AND EN-  
FORCING ORDER TO CEASE AND DESIST.**

Petitioners herein having filed with this Court on September 24, 1942 their petition to review and set aside an order to cease and desist issued against them on March 16, 1942 by the Federal Trade Commission, respondent, in a proceeding before the said respondent entitled In the Matter of Corn Products Refining Company and Corn Products Sales Company, Inc., Docket No. 3633; a copy of said petition having been served upon the respondent, the respondent having thereafter certified and filed herein as required by Section 11 of the Clayton Act a transcript of the entire record in said proceeding, respondent having filed a cross petition praying affirmance and enforcement of said order; and the matter having been heard by this Court on briefs and oral argument, and this Court having thereafter fully considered the matter and having rendered its decision on July 6, 1944 affirming and enforcing the respond-

ent's order to cease and desist in all respects except as regards price differentials on glucose delivered in different sized containers, and the Court having thereafter considered and on the 16th of August, 1944, having denied petitioners' petition for rehearing;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, that said order to cease and desist be, and it hereby is, modified by making Paragraphs (1) and (2) thereof read as follows:

(1) Directly or indirectly discriminating in price between different purchasers of glucose or corn syrup unmixed of like grade and quality in the manner and degree set forth in Paragraph Four of the findings as to the facts herein, or in any manner or degree substantially similar thereto, or from continuing or resuming any such discriminations in price (but excluding therefrom any differences in price referred to in said Paragraph Four as being dependent on the type of container in which glucose is delivered);

(2) Discriminating in price between purchasers of glucose or corn syrup unmixed by the methods set out in Paragraph Six of the findings as to the facts herein, or otherwise discriminating in price between purchasers by means of the booking or entry of orders for glucose or corn syrup unmixed, where the price differences between purchasers resulting therefrom substantially approximate or exceed those set forth in Paragraph Four of the findings as to the facts herein, provided this shall not prohibit actual sales of glucose or corn syrup unmixed for future delivery which do not involve such discriminations in price at the time of actual sale.

It Is Further Ordered, Adjudged and Decreed that as so modified said order be, and it hereby is, affirmed and enforced and the petitioners are hereby commanded to obey said order to cease and desist as modified, and to comply therewith.

It Is Hereby Further Ordered, Adjudged and Decreed that within 90 days after the entry of this decree the petitioners shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied with said order to cease and desist as modified.

Without prejudice to the right of the Federal Trade

*Motion to Extend Stay Order.*

Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court.

Signed J. Earl Major,  
Signed Otto Kerner,  
Signed Walter C. Lindley,  
*Sitting as United States Circuit Judges.*

Approved as to form:

Signed Parker McCollester,  
*Counsel for Petitioners.*

And afterwards, to-wit: On the twentieth day of September, 1944, there was filed in the office of the Clerk of this Court, a Motion to extend the Order Staying Mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Corn Products Refining Company,  
a Corporation, and Corn Products Sales Company, a Corporation,  
tion,

vs.

*Petitioners,*  
Federal Trade Commission,  
*Respondent.*

No. 8116.

**MOTION FOR EXTENSION OF ORDER STAYING  
MANDATE.**

Now come Corn Products Refining Company, a corporation, and Corn Products Sales Company, a corporation, Petitioners in the above entitled cause, and respectfully move the Court for the entry of an order herein extending.

for a period of sixty (60) days from and after September 22, 1944, the order heretofore entered herein staying issuance of mandate of this honorable court upon its order denying petition of said Petitioners for a rehearing of the above-entitled cause, pending application of said Petitioners for writ of certiorari to the Supreme Court of the United States.

And in support of said motion Petitioners show unto this Honorable Court, by the affidavit of William S. Jameson filed concurrently herewith, that preparation of petition for writ of certiorari and brief in connection therewith are in course of preparation; that affiant has been diligent in the matter of such preparation; that extension of the order staying said mandate for a period of sixty days is reasonably necessary for the completion of preparation of said writ and brief and the printing and filing thereof in the Supreme Court of the United States.

Corn Products Refining Company,  
a corporation,

Corn Products Sales Company,  
a corporation,

By William S. Jameson,

Office and P. O. Address,  
315 Grand Central Station,  
Chicago 7, Illinois,

Parker McCollester,  
Office and P. O. Address,  
25 Broadway,  
New York 4, New York,

*Attorneys for Petitioners.*

Frank H. Hall,

Office and P. O. Address,  
17 Battery Place,  
New York 4, N. Y.,

Sidney S. Coggan,

Lord, Day & Lord,

Office and P. O. Address,

Endorsed: Filed September 20, 1944. Kenneth J. Car-  
rick, Clerk.

---

And on the same day, to-wit: On the twentieth day of September, 1944, the following further proceedings were had and entered of record, to-wit:

Wednesday, September 20, 1944.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

Corn Products Refining Company,  
a Corporation, and Corn Prod-  
ucts Sales Company, a Corpora-  
tion,

*Petitioners.*

8116

vs.

Federal Trade Commission.

*Respondent.*

On Petition for Re-  
view of Order of  
the Federal Trade  
Commission.

On motion of counsel for petitioner, it is ordered that the issuance of the certified copy of the decree herein be and it is hereby stayed until the further order of this Court.

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UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed, excepting briefs of counsel, motions and orders extending time for record and briefs, motions and orders relative to printing the record and motion for enlargement of time for oral argument, in:

Cause No. 8116.

Corn Products Refining Company, a Corporation, and Corn Products Sales Company, a Corporation,

*Petitioners,*

*vs.*

Federal Trade Commission,

*Respondent,*

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of this Chicago, this 4th day of October, A. D. 1944.

(signed) Kenneth J. Carrick

(Seal)

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.



## SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6132)



FILE COPY

No. 680

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NOV 15 1944

CHARLES CLAUDE COTLEY

IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1944**

CORN PRODUCTS REFINING COMPANY, a corporation, and CORN PRODUCTS SALES COMPANY, a corporation,

*Petitioners,*

*v.*

FEDERAL TRADE COMMISSION,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT, AND BRIEF  
IN SUPPORT THEREOF**

GEORGE DEFOREST LORD,  
*Counsel for Petitioners.*

FRANK H. HALL,  
SIDNEY S. COGGAN,  
LORD, DAY & LORD,  
*Of Counsel.*







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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 25

POINT I. The Court below erred in holding that differences in delivered prices resulting from the basing point method constitute discrimination within the prohibition of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The question is of sufficient importance not only to petitioners, but also to industry generally to merit review of the decision

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1944

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CORN PRODUCTS REFINING COMPANY, a corporation, and CORN PRODUCTS SALES COMPANY, a corporation,  
*Petitioners,*

*v.*

FEDERAL TRADE COMMISSION,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT**

*To the Honorable Chief Justice and the Associate Justices  
of the Supreme Court of the United States:*

The petition of Corn Products Refining Company and Corn Products Sales Company, corporations, for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit respectfully shows:

**Jurisdiction**

This proceeding was instituted by petitioners in the Circuit Court of Appeals for the Seventh Circuit under the provisions of Section 45 of Title 15 of the United States Code to set aside an order of the Federal Trade Commission, dated March 16, 1942, ordering petitioners to cease and desist from certain practices claimed to be in violation of Sections 2 and 3 of the Clayton Act, as amended.

This petition seeks a review of the decree of the Circuit Court of Appeals for the Seventh Circuit dated September 18, 1944, which modified, affirmed and enforced the order of the Federal Trade Commission.

The jurisdiction of this court is invoked under Section 45(c) of Title 15 of the United States Code and under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. Code, Section 347).

### **Summary Statement**

#### **The Opinion of the Court Below**

The opinion of the majority of the Circuit Court of Appeals is officially reported in 144 F. (2d) 211, and is printed in the record on pages 527-541. The separate opinion by Circuit Judge MAJOR, concurring in part and dissenting in part, is officially reported in 144 F. (2d) 221, and is printed in the record on pages 541-542.

#### **Petitioners and Their Competitors**

Petitioners are engaged in the manufacture, sale and distribution of products and by-products made from corn, including glucose (corn syrup), dextrose (refined corn sugar), starches and gluten feeds. Their principal plant is at Argo, Illinois, within the switching limits of Chicago, and they have other plants at Pekin, Illinois, North Kansas City, Missouri, and Edgewater, New Jersey\* (R. 465). The issue in this proceeding concerns only the Chicago (Argo) and Kansas City plants.

Petitioners' competitors are located in Chicago, Granite City and Decatur, Illinois; Clinton and Keokuk, Iowa; Roby, Indiana; and St. Louis, Missouri (R. 466, 467).

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\* This plant has since been taken by the Government as a naval medical supply base and petitioners have moved their operations to a new plant at Ridgefield, New Jersey.

## **The Complaints of the Federal Trade Commission**

On October 21, 1938, the Commission issued a complaint charging in general terms that petitioners were discriminating in price in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, so-called, approved June 13, 1936 (U. S. Code, Title 15, Section 13). Hearings were held at which counsel for the Commission, over objection, questioned officials of petitioners as to numerous matters not indicated by the complaint. Thereafter, the Commission filed an amended complaint which, in three counts, charged petitioners with violations of Sections 2(a), 2(e) and 3 of said Act. Further hearings were had, briefs were filed and the issues were argued orally before the Commission.

The Commission then rendered its decision, finding that petitioners had violated or were violating the Act in the respects hereafter described and ordering them to cease and desist from such violations.

Petitioners then instituted this action in the Circuit Court of Appeals for the Seventh Circuit to review and set aside the Commission's decision and order. That court, however, affirmed the Commission's action in most particulars; Circuit Judge MAJOR dissented. A rehearing was denied. Petitioners do not, of course, seek a review of one phase of the matter as to which the Circuit Court of Appeals held the Commission's order not justified.\* No review is sought of the decision on the alleged violation of Section 3 of the Act (15 U. S. Code, Sec. 14).

## **The Facts and the Decisions Below With Respect to Alleged Violations of Section 2(a)**

### **The Statute**

The relevant portions of Section 2(a) of the Clayton Act, as amended in 1936 by the Robinson-Patman Act (15 U. S. Code, Sec. 13(a)), provides:

\* With respect to prices for sales of glucose in containers smaller than tank cars.

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale, within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: \* \* \*."

So far as is here pertinent, the violations of this provision alleged and found to exist, and the facts and the decision thereon can best be considered under the following general headings:

Basing Point Prices,

Delayed Bookings and Deliveries,

Sales in Tank-Car Quantities to Tank-Wagon Customers,

Allowances and Discounts.

### **Basing Point Prices**

#### **1. The Facts**

Petitioners' principal plant, which is at Argo in the Chicago switching limits, began operation in 1910 (R. 179). At that plant petitioners produced, among other things,

glucose or corn syrup unmixed which it sold in interstate commerce (R. 195). Petitioners then determined the delivered price of their glucose in tank carloads at any destination by adding to the Chicago price the carload freight rate from Chicago to that destination (R. 197). In 1922, petitioners opened another plant in Kansas City, and have since continued to use the same method of determining delivered prices at different destinations as theretofore, i. e., by adding to the Chicago base price the freight rate from Chicago to the particular destination whether the glucose is shipped from Kansas City or Chicago (R. 199).

All buyers at a given destination are charged the same price regardless of point of shipment (R. 469-470). In short, petitioners use what is commonly termed basing point pricing, a method of pricing which has long been general in many industries.

Sales of glucose in carloads are customarily made under contracts permitting purchasers to call for delivery at any time within thirty days from the date of the contract. Whether such delivery is made from the Chicago or Kansas City plant is entirely within petitioners' election, depending upon conditions at the two plants at the time (R. 195-197, 199).

Some of petitioners' customers are located at Chicago, Illinois; Kansas City, St. Joseph and Springfield, Missouri; Ft. Smith, Arkansas; Hutchinson, Kansas; Lincoln, Nebraska; Sioux City, Iowa; Waco, Sherman and San Antonio, Texas; Denver, Colorado; and Salt Lake City, Utah (R. 195). With the exception of a few sales, shipments of which were made from the plants at Chicago, Illinois, sales to purchasers located in the cities enumerated, other than Chicago, were customarily fulfilled by shipments from the plant at Kansas City, Missouri. Moreover, a substantial number of the sales to purchasers located in Chicago were fulfilled by deliveries out of petitioners' storage tanks in Chicago, to which glucose had been shipped by petitioners from both of their plants, while a few such sales were fulfilled by shipments to customers in Chicago directly from the Kansas City plant (R. 196).



Many of the purchasers located at the designated points also purchased glucose from competitors of petitioners (R. 195-196).

No testimony was offered by the Commission as to the effect of petitioners' pricing method, which was in general use in the industry, and of the delivered prices produced thereby upon competition and upon petitioners' customers, but a stipulation was entered into between counsel for the Commission and counsel for petitioners which contains all there is in the record on this point. The pertinent portions of this stipulation are as follows:

"That purchasers located in the cities enumerated above are candy manufacturers who purchase glucose or corn syrup unmixed of like grade and quality for use in the manufacture of candy and are competitively engaged in the sale of such candy to various customers, including chain stores, wholesalers and retailers, located in the various states of the United States. Such glucose or corn syrup unmixed is used as an ingredient to some extent in the manufacture of most kinds of candy and is one of the major raw materials used in the production of many varieties, constituting from five to ninety per cent. of the finished weight thereof. Generally the syrup is used in greatest proportion in candies which are sold by such candy manufacturers at above a few cents per pound and at narrow margins of profit. The higher prices paid for such syrup by such candy manufacturers located in the cities enumerated other than Chicago, Illinois, result to a greater or lesser degree in higher material costs than those of manufacturers in Chicago, the degree in each instance depending upon the difference in price and the proportion of syrup used in the particular candy manufactured. As to candies priced at but a few cents per pound and bearing no differentiating name or brand, candy manufacturers may attract customers by selling such candies at only a small fraction of a cent per pound lower than a competitor. This is especially true in selling such candies to chain stores and other purchasers of large quantities, to whom such a small difference is determinative in placing their business.

Under such circumstances, candy manufacturers paying the higher prices for such syrup than competitors may attempt to recover such increased costs by increasing the price of such candies or make only selected sales on a non-price or other basis. Unless other cost factors are present, the result in either case is to reduce profit *pro tanto*. This result may occur either directly through the absorption of higher syrup costs in the sale of candies at competitive prices or indirectly through a reduced volume of sales, or the result may be to diminish the ability of those paying the higher prices for syrup to compete with those paying the lower prices. These results may be avoided or augmented by differences in the costs to such candy manufacturers of such other factors as labor, taxes, rents, insurance, other ingredients, proximity to markets and delivery of the finished candies no matter how such differences are brought about." (R. 198-99)

There was no stipulation or proof that any candy manufacturers had knowledge that they were receiving the benefit of any discrimination in price.

Some of the candy manufacturers were located at the cities enumerated before the construction and operation of petitioners' Kansas City plant, and some candy manufacturers formerly located at said cities have, since 1922, relocated in Chicago. (R. 199).

## 2. The Decision Below

The Commission found that price discrimination in violation of Section 2(a) has occurred whenever petitioners, having sold at a delivered price made up of the Chicago base price plus freight from Chicago to a buyer's destination, have made delivery from petitioners' Kansas City plant and the freight rate from Kansas City has been less than from Chicago.

The court below upheld the Commission's decision, rejecting petitioners' contentions that:

1. Both the language and the legislative history of the Robinson-Patman amendment made it clear that the price discrimination intended to be prohibited

thereby did not embrace differences in delivered prices at different destinations resulting from the basing point method.

2. On the facts here, where contracts are made for delivery thirty days thereafter, where petitioners have two plants and do not know in advance from which plant shipment may be made, no discrimination in price results from contracting for a delivered price, the freight factor of which may later prove to be different from the actual freight.

3. Much more serious discrimination between customers at the same destination would result from charging them different prices dependent upon the plant from which shipment happened to be made.

4. The stipulation did not warrant a finding of reasonable probability that the charging of "Chicago plus" delivered prices would, where deliveries were made from the Kansas City plant, have the effect upon competition described in Section 2(a) and essential to a finding of a violation thereof.

5. There was no finding and no evidence that any customer "knowingly receives" the benefit of the alleged discrimination, and without such a finding no decision could properly be made that Section 2(a) was violated.

6. For these reasons, the decision and order of the Commission were contrary to law and arbitrary.

On the same day that the Circuit Court of Appeals handed down its decision in this action, it rendered a decision in a companion case involving the A. E. Staley Manufacturing Company, one of petitioners' principal competitors, *A. E. Staley Mfg Co. v. Federal Trade Commission*, 144 F. (2d) 221. It there held, with Judge MAJOR dissenting, that the basing point pricing system violated Section 2(a) but that since the system was in general use in the industry, the Staley Company was justified in making its delivered prices by the basing point method in order to meet competition.

It therefore directed that the Commission's cease and desist order in that case be vacated and its complaint be dismissed. In that case, the facts were much less favorable to the manufacturer, since the Staley Company has only one plant and that plant is not at Chicago, the basing point.

The Solicitor General has recently filed a petition for certiorari in the *Staley* case alleging that the questions presented in that case are of general importance and of concern to members of industry and to the Federal Trade Commission, all reasons equally applicable here. The instant case presents the basing point price issue more clearly than the *Staley* case, which involves chiefly the issue of meeting competition under Section 2(b) of the Act.

## **Delayed Bookings and Deliveries**

### **1. *The Facts***

In the case of price advances, it has been petitioners' practice to accept orders for glucose at the old or lower prices for a period of usually five and occasionally ten days after announcement of price increases (R. 203). To receive the benefit of the old price, the purchaser must ordinarily call for or take delivery of the glucose thus ordered within thirty days from the date of the advance (R. 205). Petitioners endeavor not to accept orders for more than a purchaser's normal requirements for thirty days, these being determined as nearly as possible by petitioners' executives based upon the customer's past purchases from petitioners and petitioners' knowledge of the customer's business (R. 229). In certain instances, however, petitioners (1) have allowed customers to book at the old prices after the expiration of more than five days from the announcement of price increases (R. 219-220, 227), and (2) have extended the time within which withdrawals could be made by customers against orders so as to permit deliveries to be made to customers at the old prices more than thirty days after the announcement of price changes (R. 221).

The uncontradicted testimony of the witnesses called by both sides was that these things were done by petitioners to meet competition (R. 220-221, 227, 256, 324, 328-329, 348, 365), but the Commission made no findings to this effect (R. 472, 473). No evidence whatever was produced as to the effect of these practices upon competition either with petitioners or with their customers.

## 2. *The Decisions Below*

The Commission found that the practices described constituted price discrimination within the prohibition of Section 2(a). It did this despite the fact that there was no proof whatever as to the effects of these practices upon competition. The Commission, in order to support a finding of a violation, treated the stipulation entered into solely with regard to the basing point question as a stipulation of facts regarding the effect upon competition of delayed bookings and deliveries. It failed to find, in accordance with the uncontradicted testimony, that these practices were resorted to to meet competition.

The Circuit Court of Appeals upheld the Commission's decision and rejected petitioners' contentions that:

1. Extensions of time for booking orders or for taking delivery were matters of the terms and conditions of contracts of sale and not of price and therefore did not come within the application of Section 2(a).

2. There could be no finding of a violation of Section 2(a) in view of the complete absence of any proof or stipulation as to the effect of these practices upon competition, and that the failure of the Commission so to find was arbitrary.

3. The Commission erred and its decision was arbitrary in failing to give effect to the uncontradicted evidence that petitioners did these things only to meet the competition of similar practices by its competitors.



## Sale of Tank-Car Quantities to Tank-Wagon Customers

### 1. *The Facts*

At various times petitioners have booked orders for and sold tank-car quantities to customers in the Chicago area who ordinarily purchase only in small tank-wagon quantities, and have no facilities for unloading tank cars. Delivery has been made to them by tank wagon from petitioners' storage facilities. In all such instances, however, they have been charged the higher tank-wagon prices (R. 254, 255, 285, 286, 288). The privilege has been offered to all tank-wagon customers in the Chicago area (R. 328, 365). Petitioners have done these things to meet similar action of competitors (R. 256, 324, 329, 348). There was no proof or stipulation as to the effect of this practice on competition.

### 2. *The Decisions Below*

The Commission found that these acts constituted price discrimination in violation of Section 2(a) and ordered petitioners to cease and desist therefrom.

The Circuit Court of Appeals upheld the Commission's decision and rejected petitioners' contentions that:

1. Since these tank-wagon buyers paid the tank-wagon prices, there was no discrimination in price.

2. Since the privilege was offered to all tank-wagon buyers, there was no discrimination.

3. In the complete absence of proof or stipulation as to the effect of the practice on competition, there could be no finding of a violation of Section 2(a).

4. The uncontradicted evidence required a finding that the practice was justified because indulged in for the purpose of meeting competition.

5. The failure of the Commission so to decide was arbitrary.

## Allowances and Discounts

### 1. *The Facts*

As a by-product of their corn refining, petitioners produce gluten feed and meal in the amount of more than 250,000 tons annually, which is approximately 40 to 50 per cent of all such products used in the United States. Petitioners sell and ship such products to approximately 3,000 different purchasers located in different states. Such feed and meal compete with similar products produced and sold by petitioners' competitors in the corn refining industry and with other types of feed produced by distillers, cottonseed mills, wheat flour mills, and soya bean crushers. Under contracts or oral arrangements with certain purchasers who buy these products in very large quantities, petitioners have granted to them discounts or allowances below petitioners' quoted market prices amounting to 50 cents and, in some cases, 65 cents per ton (R. 108, 114, 117).

No testimony was offered as to the effect, if any, of these practices upon competition. All that there is in the record on this point is a stipulation entered into by the parties (R. 186-191). It was stipulated that the dealers to whom the allowances were granted were in competition with other dealers to whom petitioners also sold, both in the sale of prepared mixed or branded feed products and in the resale of feed and meal products unmixed, and that the allowances granted the favored customers would be sufficient "if and when" reflected in whole or in substantial part in resale prices to attract business to the favored customers away from his competitors or to force such competitors to resell feed and meal products at a substantially reduced profit or to refrain from reselling. It was not stipulated, however, and there was no proof that the allowances ever were reflected by the customers in their prices.

It was also stipulated that in the period since June 19, 1936, petitioners sold substantial quantities of certain brands of starch to Keever Starch Company and Stein-Hall

Company and that commissions or allowances from petitioners' prices were made to these concerns, while at the same time substantial quantities of these commodities were sold at current market prices without allowances to other concerns competitively engaged with Keever and Stein-Hall. There is no contention that these discounts or allowances were justified by savings in the cost of manufacture, sale or delivery resulting from the different methods in which the starch was sold to these concerns as compared with its sale to other buyers. It was stipulated that the allowances granted by petitioners to Keever and Stein-Hall were sufficient "if and when" reflected in whole or in substantial part in retail prices to attract business to them and away from their competitors or to force such competitors to resell such products at substantially reduced profit or to refrain from reselling. Here, again, there was no proof that the discounts ever were so reflected or ever had the results described (R. 191-193).

## 2. *The Decisions Below*

The Commission found that all of these practices violated Section 2(a) and ordered petitioners to cease and desist therefrom.

This decision was upheld by the Circuit Court of Appeals, which, rejected petitioners' contentions that:

1. On the basis of the stipulations and in the complete absence of any proof that the discounts or allowances were ever reflected in the prices charged or that they affected the competitive situation in any way, no finding of a violation of Section 2(a) was possible.

2. Therefore, the decision of the Commission was arbitrary.

## **The Facts and the Decisions Below With Respect to the Alleged Violation of Section 2(e)**

### **The Statute**

Section 2(e) as amended by the Robinson-Patman Act provides:

"That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

### **The Facts**

Prior to 1936, dextrose (refined corn sugar) although known to physicians and technical experts, was a new product to the housewife, the baker and the confectionery industry (R. 174). Although petitioners had been manufacturing and selling dextrose before 1936, approximately 80 per cent of their sales were to the baking industry. Petitioners desired to expand the field of dextrose and stimulate its use by other industries (R. 175). The manufacturing processes of candy makers had been developed on the basis of using other ingredients than dextrose and a great deal of research was necessary before they would change their formulae to include the use of dextrose (R. 175). In these circumstances, the officials of petitioners conceived the idea of finding a candy manufacturer, selling and advertising on a national scale, who could be persuaded to use dextrose and then to publicize, through his advertising and sales media, the use of dextrose as an ingredient in his candies. Two preliminary experiments in this direction were made in a small way with the Bachman Chocolate Manufacturing Company of Mt. Joy, Pa. and with the Lewis Candy Company in New England, but these did not prove successful

because these companies did not have adequate distribution (R. 61, 62, 180, 181). Then petitioners approached the Mars Candy Company on the proposition, but it was unwilling to undertake the experiment (R. 62). In 1935 or 1936 petitioners entered into negotiations with the Curtiss Candy Company for the purpose of inducing that company to use dry dextrose in its candies and to advertise them as containing dextrose. Curtiss had as wide a distribution of its candies as any candy manufacturer in the United States, was as aggressive as any other company in the business, and its national advertising over a period of ten years was almost equal to that of all the others in the field (R. 300, 301). Before Curtiss would enter into any arrangement it experimented for approximately a year with the help of petitioners to ascertain whether dextrose could be used satisfactorily in its candies (R. 175). In September 1936, Curtiss and petitioners reached an understanding for the arrangement here involved. The substance and essential features of the arrangement were as follows:

(1) The arrangement was not a part of any contract or agreement by Curtiss to purchase dextrose or corn syrup from petitioners and contained no condition requiring such purchase. Curtiss did agree to use in its candies a sufficient quantity of dextrose so that the candies might legitimately be advertised as "rich in dextrose" but Curtiss was left free to purchase dextrose from any suppliers and there were other companies than petitioners which produced and sold dextrose (R. 296, 297, 318).

(2) Curtiss agreed to show the words "rich in dextrose" on all of its wrappers and other containers, in its display advertising and upon the uniforms of its peddlers. This was done by Curtiss at very substantial expense to it (R. 174, 179, 302, 303, 317).

(3) Curtiss agreed to and did place its national radio and magazine advertising through petitioners' advertising agency, and advertisements were worked



up in which Curtiss advertised their candies as "rich in dextrose" while petitioners advertised the use of dextrose as an ingredient in Curtiss candies (R. 59, 178, 297, 299).

(4) Petitioners paid no money in any way to Curtiss. Each party paid the advertising agency for the radio and magazine advertisements placed for it by the agency. Petitioners' expenditures for their own advertising of their dextrose under the arrangement amounted to \$100,000 in 1936, \$250,000 in 1937, and \$200,000 in 1938 and 1939 respectively (R. 297). The total advertising expenditures of Curtiss for advertising its candies stood in the ratio of at least two to one to those of petitioners (R. 177). However, neither party was under any obligation to spend any definite amount or any amount at all for its advertising (R. 61, 318).

Although not obligated by the arrangement to purchase any dextrose from petitioners, Curtiss, since the arrangement was entered into, had increased its purchases of both corn syrup and dry dextrose from petitioners (R. 291, 292). This was not pursuant to any understanding relating to the advertising arrangement (R. 293, 294).

The Curtiss Candy Company is engaged in the manufacture and sale of candies (R. 292). It is not engaged in the sale of dextrose. The dextrose and corn syrup which it purchased from petitioners was purchased by it for use as an ingredient in its candies and not for resale by it as dextrose or corn syrup (R. 293).

Petitioners have offered an arrangement similar to that with Curtiss Candy to others, and petitioners' vice-president testified that petitioners are ready at any time to enter into similar arrangements on a proportional basis with any other candy manufacturer who is willing to use sufficient dextrose in his candy to advertise it as "rich in dextrose", is willing to advertise the dextrose content as a

feature of his candies, changing his wrappers and other advertising media for the purpose and whose distribution and national advertising are substantial (R. 179-180).

### **The Decisions Below**

The Commission found that this arrangement constituted a violation of Section 2(e) and ordered petitioners to cease and desist therefrom.

The Circuit Court of Appeals upheld this decision, rejecting petitioners' contentions that:

1. Since dextrose was purchased by Curtiss for and used only as an ingredient in its candies and completely lost its identity, the transaction did not have to do with the sale of a commodity "bought for resale, with or without processing" and Section 2(e) was not applicable.

2. Since it was no part of the arrangement with Curtiss that it should purchase dextrose from petitioners, the transaction was not with Curtiss as a "purchaser" and hence Section 2(e) was inapplicable.

3. There was no proof to support a finding of discrimination since there was no evidence of any other candy manufacturer who had similar advertising; there was no proof of any candy manufacturer who wanted to enter into a similar arrangement or had been refused by petitioners, and petitioners' witnesses testified without contradiction that petitioners were willing to make similar arrangements with other candy manufacturers with similar nationwide advertising and methods of distribution.

4. Such arrangement between petitioners and Curtiss did not constitute a service or facility within the meaning of Section 2(e).

## **The Questions Presented and the Reasons for Review by This Court**

**I. Questions under Section 2(a) of the Clayton Act, as amended, with regard to the basing point system and petitioners' pricing practices.**

### **A. Questions**

1. Do such differences in delivered prices at different destinations as result from the basing point method constitute discrimination in price within the prohibition of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, so-called, approved June 13, 1936 (U. S. Code, Title 15, Section 13)?

2. Where a company has several plants, one of them at a base point, and it contracts in advance for sales, not knowing from which plant shipment will be made, is it unlawful for it to contract for a delivered price arrived at on the basis of the freight rate from the base point, if it thereafter becomes necessary or it elects to ship from the other plant and if the freight from the latter to the customer's destination is lower than that from the basing point?

3. So long as all customers at a given destination are charged the same price under contracts for advance sales, regardless of the manufacturer's election as to the plant from which shipment may ultimately be made, is Section 2(a) of the Clayton Act violated because the delivered price is arrived at by the basing point method in the event shipment is ultimately made from a plant from which the freight rate is less than that from the base point?

4. Is the language of Section 2(a) of the Clayton Act concerning the effects which price discrimination must have upon competition to establish a violation, to be given a different meaning from that placed by this court upon similar language in Sections 3 and 7 of the same act?

5. In the complete absence of proof of any knowledge on the part of petitioners' customers that they were receiving the benefit of alleged discrimination, can there properly be a finding that Section 2(a) is violated?

6. Where the parties stipulate the ultimate facts as to the effect of pricing practices on competition, may the Commission and the court infer other facts?

7. Were the decision and order of the Commission in accordance with the law and supported by substantial evidence?

### B. Reasons for Review

In its effect on many of this country's principal industries, the present case is one of the most important commercial cases to come to the attention of this court in many years. We state this since the basing point method of pricing is and for many years has been in use in many important industries of the country. It was employed in industries the lawfulness of whose practices under the anti-trust laws has been before this court, and it has not been condemned; *Maple Flooring Manufacturers Association v. United States*, 268 U. S. 563 (1925); *Cement Manufacturers Protective Association v. United States*, 268 U. S. 588 (1925). In the latter case this court referred to the benefit of the basing point pricing method in avoiding monopoly and preserving and promoting competition. If delivered prices produced thereby are now unlawful, there will have to be radical changes in the methods of business of many companies.

Before the amendment of Section 2 of the Clayton Act in 1936 by the Robinson-Patman Act, it was never held that differences in delivered prices resulting from the basing point method were unlawful thereunder. The decisions below purport to rest upon the language of Section 2(a) as it was amended by the Robinson-Patman Act. Even since the enactment of that Act, however, until the

decisions of the court below in this case and in the *Staley* case, referred to on page 8, it has never been held that the amendment outlawed delivered prices resulting from the basing point method.

Hence the decision of the court below confronts petitioners and many industries for the first time with the suggestion that the basing point pricing method long used by them is now unlawful. The importance of the matter calls for review of the decision by this court.

Such a review is the more necessary and important in view of the fact, which will be shown more fully in brief and argument, that the legislative history of the Robinson-Patman Act and the Congressional debates on the bills make it clear that it was not the intention of Congress thereby to outlaw basing point prices. Moreover, various attempts to obtain Congressional approval of bills which would prohibit basing point prices have failed, clearly confirming the Congressional intention that basing point prices are not unlawful.

A decision of the Commission and of a Circuit Court of Appeals which gives to a statute an interpretation and effect so plainly contrary to the will of Congress should be reviewed by this court.

Even if it should, nevertheless, be held that differences in delivered prices produced by the basing point method constitute discrimination in price within the prohibition of Section 2(a), there are other questions affecting the interpretation, application and administration of that section which call for authoritative ruling by this court.

Thus the decisions of the Commission and of the court below as to the nature of the proof of the effect of price discrimination which must exist to constitute a violation appear in conflict with decisions of this court and of the circuit courts of other jurisdictions interpreting and applying similar language in Sections 3 and 7 of the same statute.

*International Shoe Co. v. F. T. C.*, 280 U. S. 291 (1930), at p. 298;



*Standard Fashion Co. v. Magrane-Houston Co.*,  
258 U. S. 346 (1922), pp. 356-357;

*A. E. Staley Mfg. Co. v. Federal Trade Commission*, 135 F. (2d) 453 (C. C. A. 7th, May 10, 1943);

*Standard Oil Co. v. F. T. C.*, 282 Fed. 81 (C. C. A. 3rd, 1922), pp. 86-87;

*Pennsylvania Railroad Co. v. I. C. C.*, 66 F. (2d) 37 (C. C. A. 3rd, 1933);

*Temple Anthracite Coal Co. v. F. T. C.*, 51 F. (2d) 656 (C. C. A. 3rd, 1931);

*Vivaudou, Inc. v. F. T. C.*, 54 F. (2d) 273 (C. C. A. 2nd, 1931);

*United States v. Republic Steel Corporation*, 11 F. Supp. 117 (D. C., N. D. Ohio, 1935).

The confusion thus created calls for clarification.

Furthermore, it is important for industries to know whether, as the statute says, knowledge on the part of a customer that he is receiving the benefit of an alleged price discrimination is an essential part of a violation, and whether such knowledge must be proved by evidence, or whether it may be inferred by the Commission from its own imagination without evidence.

**II. Questions under Section 2(a) with regard to other practices found unlawful by the Commission and reasons for a review of the decision below with reference thereto.**

#### **A. Questions**

1. Did petitioners' action in extending the time within which buyers could book orders at old prices and the time for calling for delivery on the occasion of price changes beyond the period generally allowed constitute price discrimination within the prohibition of Section 2(a)?

2. Did the sale of glucose in tank-car quantities to buyers customarily buying in tank-wagon lots constitute un-

lawful discrimination in violation of Section 2(a) under the circumstances shown?

3. Could the Commission properly find a violation of Section 2(a), in the complete absence of any proof as to the effect of the practices in question upon competition?

4. Could the Commission properly find a violation of Section 2(a) by reason of the discounts or allowances, on the basis of a stipulation that these allowances might affect competition if reflected in the customers' prices, when there was no evidence that they ever were so reflected?

5. Did the Commission act arbitrarily and in disregard of the evidence or lack of evidence?

#### B. Reasons for Review

For the public as a whole, it is important that there be a controlling decision on the effect and application of Section 2(a) of the Clayton Act in these respects, for many business practices are dependent thereon. And so far there has been no such controlling decision.

### III. Questions under Section 2(e) and reasons for a review of the decisions below with reference thereto.

#### A. Questions

1. Is a commodity purchased by a manufacturer solely for use as an inseparable ingredient in another article "a commodity bought for resale, with or without processing"?

2. In view of the fact that the advertising arrangement with Curtiss contained no obligation on Curtiss to purchase dextrose or other commodities from petitioners, was the arrangement one with Curtiss as a "purchaser" within the application of Section 2(e)?

3. Was there substantial evidence to support the decision or did the Commission act arbitrarily?

### B. Reasons for Review

Apart from the injustice to petitioners, if the decision was arbitrary and without support in the evidence and if the decision was the result of an erroneous interpretation of Section 2(e), there is the question as to what is meant by the term "a commodity bought for resale, with or without processing", which must be of concern to many business enterprises. The decision below is so broad that this phase of it would apply to most manufacturing processes. This is a question which has not been before this court and as to which no controlling precedent yet exists.

WHEREFORE your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court to the Circuit Court of Appeals for the Seventh Circuit commanding that court to certify and send to this court for its review and determination a full and complete transcript of the record and that the decision of said Circuit Court of Appeals be reversed in so far as it upheld the order of the respondent, and that petitioners have such other and further relief as may be just.

Dated, New York, N. Y.,  
November 14th, 1944.

CORN PRODUCTS REFINING COMPANY,  
CORN PRODUCTS SALES COMPANY,

By GEORGE DEFOREST LORD,  
*Counsel for Petitioners.*

P

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### POINT I.

The Court below erred in holding that differences in delivered prices resulting from the basing point method constitute discrimination within the prohibition of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The question is of sufficient importance not only to petitioners, but also to industry generally to merit review of the decision.

#### A. The Importance of the Basing Point Question.

This case brings to this Court for the first time the question of the lawfulness under the Clayton Act in its present form of basing point delivered prices.

The Federal Trade Commission is not in a position to deny that this question is of importance, for in its petition for a writ of certiorari in the *Staley* case it stated at page 9:

"This case and *Corn Products Refining Co. v. Federal Trade Commission*, which was decided by the court below on the same day and which also involves the validity under Section 2 of the Clayton Act of the delivered price system in effect in the glucose industry, are the first judicial decisions dealing with the application of Section 2, as amended by the Robinson-Patman Act, to sales under a delivered price, basing-point system. It is of grave concern to the Federal Trade Commission in its administration of Section 2, as well as of concern to the members of industry, that the questions raised in this case, which led to three opinions in the court below, should be set at rest by decision in this Court."

For years there has prevailed in the corn processing industry, as in various other industries, the practice of



determining delivered prices at different destinations by adding to a base price the freight rates from the basing point, so-called, to the buyers' localities. In the corn processing industry, the basing point has been Chicago, where petitioners have their principal plant, established in 1910. In 1922, they opened another plant at Kansas City. They have continued to determine their delivered prices as before by adding to the Chicago base price the freight rate from Chicago to the destination of each buyer. The Federal Trade Commission has found that discrimination in price in violation of Section 2(a) of the Clayton Act, as it was amended in 1936 by the so-called Robinson-Patman Act, occurs whenever shipment is made from Kansas City and the freight rate from Kansas City to a buyer's destination happens to be less than the freight rate from Chicago, despite the fact that the contracts allow buyers thirty days within which to take delivery and at the time the sales are concluded it cannot be determined from which plant delivery will have to be made. This decision has been upheld by the Circuit Court of Appeals for the Seventh Circuit.

If this decision stands, it will affect the pricing methods not only of petitioners but of numerous industries. This court is, of course, familiar with the extended discussion and writings with regard to the Pittsburgh-plus prices in the steel industry. In at least two cases that have been before this court the industries involved have employed the basing point method. *Maple Flooring Manufacturers Association v. United States*, 268 U. S. 563 (1925); *Cement Manufacturers Protective Association v. United States*, 268 U. S. 588 (1925). The Federal Trade Commission has recently made a decision in regard to the cement industry, holding the basing point price method in that industry discriminatory in violation of Section 2(a), and proceedings to review that decision are pending in the Circuit Court of Appeals for the Seventh Circuit.

Hence, this case squarely raises for review by this court a question as to the effect of the Clayton Act upon pricing practices which is of general concern.

**B. If Basing Point Prices Have Now Been Made Unlawful, This Represents a Radical Change in the Law, Which Should Not Be Given Effect Without Examination of the Pertinent Statutes by This Court.**

Despite the general use of the basing point pricing method and the numerous discussions thereof, it has never been held by any court that either the method or the prices resulting therefrom were unlawful. This court did not condemn them in the two cases previously cited. It is only by reason of the amendment of Section 2(a) of the Clayton Act in 1936 that it is now contended by the Federal Trade Commission that differences in prices resulting from the basing point method have become unlawful. The decisions both of the Commission and of the court below rest upon this amendment of the statute.

The statute, as amended, does not, however, expressly prohibit differences in prices produced by the basing point method. Neither does it declare that the basing point method is itself unlawful. Consequently, the decisions below rest upon an interpretation of the language used by Congress. We submit that an interpretation, which would give this language the effect of prohibiting a long-standing practice, should not be permitted to stand without review by this court.

There is the more reason for this contention in view of the legislative history of the Robinson-Patman amendment.

**C. The Decisions Below Give to Section 2(a) an Effect so in Conflict with the Intention of Congress That They Should Be Reviewed by This Court.**

Section 2(a), as amended by the Robinson-Patman Act, does not define discrimination in price. Obviously, it was not intended by Congress when it prohibited discrimination in price to require that all goods should be sold at uniform prices throughout the country. It becomes necessary and ap-

propriate, therefore, to examine the legislative history and the Congressional debates to see what light they shed upon the question whether Congress, when it prohibited discrimination in price, meant to make it unlawful for an industry to sell at different prices at different destinations, the differences being determined by the basing point method. The discussions in Congress upon the bills which became the Robinson-Patman amendment make it amply clear not only that Congress did not intend to make unlawful the basing point price method and the differences in prices resulting therefrom, but that it was only upon the assurance that the amendment would not have this result that the managers of the bill secured its passage.

The following colloquy which took place during the debate in the Senate, indicates that it was regarded, when the bill was considered, that the prohibition against selling on delivered prices computed by the basing-point method had been eliminated and that the Robinson-Patman Act as passed would not prohibit the basing-point method:

"Mr. Davis. Mr. President, if I may have the attention of the Senator from Idaho, I should like to ask him whether this proposed legislation changes in any way the present status of the basing-point plan now used by steel and cement and other natural-resource industries.

Mr. Borah. I could not answer offhand, because I am not sure that I know the exact operation of the basing-point plan in the steel industry.

Mr. Davis. Under the basing-point plan in the steel industry the markets all over the country are available for anyone who is engaged in that industry.

Mr. Borah. My opinion would be that this does not have any effect upon that. I defer to the judgment of the Senator in charge of the bill, but that would be my impression.

Mr. Van Nuys. The Senator from Idaho is correct." (80 Congressional Record, p. 9903)

Moreover, we have not only the benefit of these statements but we have the fact that a provision originally in-

serted in the bill which would definitely have prohibited delivered prices resulting from the basing point method was stricken from the bill in order to make it plain that the basing point prices were not affected and that the elimination of this provision was deemed necessary by the committees in charge in order to secure the passage of the bill.

The provision which was stricken from the bill was as follows:

"(5) That the word, 'price' as used in section 2 shall be construed to mean the amount received by the vendor after deducting freight or other transportation, if any, allowed for defrayed by the vendor."

The following excerpts from the Congressional Record show it was believed that the bill would not pass unless this clause was eliminated:

"Mr. Miller: . . . The next amendment that will be offered by the committee as a committee amendment will be directed at subsection (5) on page 7, which is the basing point provision in the bill.

Mr. Rich: Does the gentleman mean to strike out the whole section?

Mr. Miller: That amendment will be for the purpose of striking out all of subsection (5), or the basing point provision in the bill. Probably that provision should not have been put in a bill amending the Clayton Act; but it was put in and the committee has decided to offer an amendment to take it out." (80 Congressional Record, p. 8106)

"Mr. McLaughlin: The fact is, however, that in the letter to which the gentleman has referred from the farm organizations they object to the basing-point system and object to the classification, both of which have been stricken from the bill." (80 Congressional Record, p. 8107)

"Mr. Patman: . . . Farmers' organizations sent letters to all the Members saying they were opposed to certain things; I learned through their rep-

representatives in Washington 2 or 3 weeks ago they were opposed to the basing-point provision of the bill, section 5. So I took it up with the Judiciary Committee. The committee members had heard similar complaints and the committee at a meeting agreed to cut out the basing-point provision. This silenced a lot of the opposition. The basing point is not directly related to what we are trying to do, as I view it, so it was all right to cut that out." (80 Congressional Record, p. 8113)

"Mr. Boileau: \* \* \* Another objection raised by these farm leaders was with respect to the anti-basing-point provision. They felt that this was a dangerous feature of the bill. I personally would rather have that anti-basing-point provision in the bill, but the committee, in its wisdom, will submit a committee amendment striking it out. The members of the steering committee believe that in order to insure its enactment we should eliminate this provision, and, although personally I would prefer that it remain in the bill, I am nevertheless willing to go along. I am pleased that in this respect we are meeting the demands of the farm organizations with whom I have always tried to cooperate, both as a member of the Committee on Agriculture and as a Member of the House, and whose views I have welcomed at all times in the consideration of this bill." (80 Congressional Record, p. 8122)

"Mr. Robsion of Kentucky: \* \* \* There were two features, however, on which we were not in full agreement. Many of us opposed section 5, on page 7, of this bill. It is the so-called price-fixing or basing-point provision. It has been unanimously agreed that that section go out; \* \* \*." (80 Congressional Record, p. 8130)

"Mr. Miller: \* \* \* The second amendment which the Committee on the Judiciary will offer is to lines 20 and 23 on page 7 of the committee amendment to the bill, and the amendment will be a motion to strike said lines 20 to 23, both inclusive, therefrom.



"This particular section which the committee will seek to strike out is designated as subsection (5) on page 7, and is what is commonly called the basing-point provision." (80 Congressional Record, pp. 8139, 8140)

Reference is also made to statements of Representative Crawford in the Congressional Record at pages 8126, 8127, and Representative Citron in the Congressional Record at pages 8223, 8224.

The intention of Congress that basing point prices would not be unlawful under Section 2(a) as amended is confirmed by the fact that other bills have been introduced from time to time, including bills sponsored by the Federal Trade Commission, which would specifically prohibit basing point prices, and that none of these bills has become law.

Thus, in 1936, there was pending in the Senate S. 4055 (and a counterpart in the House, H. R. 10385), which was expressly aimed at eliminating the basing point. Hearings on this bill were held before the Senate Committee on Interstate Commerce from March 9 to April 10, 1936, but the bill was never enacted. Another bill to the same effect which never reached enactment was S. 3744.

We submit, therefore, that the decisions below run so counter to the plain intent of the law-making agency that they should be reviewed and reversed by this court.

**POINT II.**

The decision of the Commission and of the Court below as to the effects of alleged price discrimination upon competition which must be shown in order to establish a violation of Section 2(a) are in conflict with decisions concerning similar language in other sections of the same statute. The matter is one of general concern meriting review.

Under the language of Section 2(a), a violation is not established by merely showing that a seller has charged different prices or, indeed, has discriminated in price. It must also be shown that the effect of the discrimination "may be substantially to lessen competition or tend to create monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers or either of them." Similar language is contained in Sections 3 and 7 of the Clayton Act. It has been held by this Court and by the Circuit Court of Appeals of several of the circuits that the words "may be" in these sections connotes something more than a mere theoretical possibility and that in order to establish a violation the evidence must show reasonable probability of the consequences described. Moreover, importance has been given to the words "substantially lessen competition" because it has been held that competition cannot be substantially lessened unless substantial competition exists.

*International Shoe Co. v. F. T. C.*, 280 U. S. 291 (1930), at p. 298;

*Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346 (1922), pp. 356-357;

*A. E. Staley Mfg. Co. v. Federal Trade Commission*, 135 F. (2d) 453 (C. C. A. 7th, May 10, 1943);

*Standard Oil Co. v. F. T. C.*, 282 Fed. 81 (C. C. A. 3rd, 1922), pp. 86-87;

*Pennsylvania Railroad Co. v. I. C. C.*, 66 F. (2d) 37 (C. C. A. 3rd, 1933);

*Temple Anthracite Coal Co. v. F. T. C.*, 51 F. (2d) 656 (C. C. A. 3rd, 1931);

*Vivaudou, Inc. v. F. T. C.*, 54 F. (2d) 273 (C. C. A. 2nd, 1931);

*United States v. Republic Steel Corporation*, 11 F. Supp. 117 (D. C., N. D. Ohio, 1935).

In the *Standard Fashion Co.* case, this Court said (pp. 356-357):

“\* \* \* But we do not think that the purpose in using the word ‘may’ was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed *probably* lessen competition, or *create an actual tendency to monopoly*. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial.” (Italics ours.)

Citing that case, Judge WOOLLEY, speaking for the Court in *Standard Oil Co. v. Federal Trade Commission*, said (at p. 86):

“\* \* \* To make clear the principle upon which we shall examine the testimony and decide these cases, it may be well to observe that the Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not wait for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipency and stop their growth. Yet, in thus avoiding an objectionable effect by removing the cause, the Congress did not intend the statute to reach every remote lessening of competition or every dim and uncertain tendency to monopoly. It intended rather

*that the Commission, and ultimately the courts, should inquire not whether a given practice may possibly lessen competition or possibly create a monopoly, but whether it probably lessens competition—and lessens it substantially—and whether it actually tends to create a monopoly.*” (Italics ours.)

In *International Shoe Company v. Federal Trade Commission*, this Court said (at p. 298):

“Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 357; that is to say, to such a degree as will injuriously affect the public. Obviously, such acquisition will not produce the forbidden result if there be no pre-existing substantial competition to be affected; for the public interest is not concerned in the lessening of competition, which, to begin with, is itself without real substance.” (Italics ours.)

The decision of the Commission and of the court below are plainly at variance with the foregoing decisions and would give to the language of Section 2(a) a wholly different effect from that attributed to similar language in the cases cited.

Thus the Commission called no witnesses as to price differences resulting from the basing point pricing system, and offered no evidence as to the effect of these differences upon competition. All that the record contains on the point is a stipulation entered into between counsel for the Commission and counsel for petitioners. The Commission did not, and on the record could not, find that the basing point pricing method tended to a monopoly in petitioners themselves. The Commission's findings on this point were directed solely to the effect of the pricing method on the competitive ability of candy manufacturers purchasing from petitioners. The Commission and the court below reached

their conclusions solely by placing interpretations upon the stipulation and drawing inferences therefrom of facts not agreed to by the parties. A fair reading of this stipulation requires that the conclusion be drawn therefrom that there is at least as much likelihood that when shipment is made from Kansas City the fact that petitioners incur a lower freight cost than if shipment had been made from Chicago has no effect upon the ability of a candy manufacturer to compete. Indeed, the very circumstance peculiar to the position of petitioners here that the price to a customer is agreed upon in advance and at that time it may be impossible to tell whether shipment will be made to him from Chicago or from Kansas City makes it obvious that the point of actual shipment and the freight rate therefrom can have no effect upon the buyer's competitive ability.

With respect to the extensions of time to book orders and to take delivery and the sale of glucose in tank-car lots to tank-wagon buyers, there is neither a stipulation nor a scintilla of evidence as to the effect of these practices upon competition with or the competitive ability of either petitioners or their customers. The decisions below, therefore, in effect, represent holdings that the language of this portion of Section 2(a) may be disregarded, a decision which certainly merits review.

In the case of the allowances or discounts to buyers of feed and to certain purchasers of starch, there was no evidence and only a stipulation as to the effect of these allowances or discounts on competition. The stipulation in each instance was that the discounts or allowances might give to each of the recipients a competitive advantage if used to reduce its sales price, but there was not a word in the stipulations and not a scintilla of proof that the discounts or allowances were ever so used. For all that the record discloses, the discounts may have been distributed as increased profits to the stockholders, or may have been absorbed by additional manufacturing or other costs. Certainly there was no showing of any reasonable probability of a tendency to monopoly or elimination of competition.



Finally, as to all of the situations dealt with, there is not a word either by way of testimony or stipulation that any purchaser from petitioners who was the beneficiary of a supposed discrimination knew that he was being favored. Therefore, in finding violations, the Commission in effect struck from the statute the words "knowingly receives the benefit of such discrimination". The decision of the lower court upholding this action should be reviewed.

### POINT III.

**The decisions below should be reviewed because the action of the Commission was arbitrary and in disregard of uncontradicted evidence.**

Under the statute, price discrimination compelled by the necessity of meeting competition is excused. There was uncontradicted evidence that petitioners' practices in extending the times for customers to book orders and take deliveries and in selling in tank-car quantities to buyers customarily purchasing only in tank-wagon lots were undertaken by petitioners to meet competition and because similar practices had already been indulged in by petitioners' competitors. This evidence was ignored, although in the *Staley* case the court below set aside the Commission's order in a finding that the corn industry was highly competitive and that Staley made its delivered prices by the basing point method because that method was in effect in the corn industry and Staley adopted it to meet competition. Furthermore, the Staley Company was one of petitioners' competitors. If the Staley Company was excused because of competitive conditions, it would seem inevitable that its competitors should be similarly excused.

#### POINT IV.

The decisions below with respect to the Curtiss transaction do violence to the language of Section 2(e). Questions of statutory interpretation are involved which are of general interest to manufacturers and should be passed upon by this Court.

A. Whether a Commodity Purchased and Used as an Inseparable Ingredient of a Totally Different Manufactured Article is "a commodity bought for resale, with or without processing" Within the Meaning of Section 2(e) is an Issue of General Concern to Manufacturers.

Section 2(e) prohibits discrimination through the furnishing of services or facilities in favor of one purchaser as against another "of a commodity bought for resale, with or without processing." The commodity in question here was dextrose (refined corn sugar). It was bought by the Curtiss Candy Company and used by it solely as an ingredient in candies. When candy is made, the dextrose therein cannot be separated or distinguished without chemical analysis. The Curtiss Candy Company does not sell dextrose and did not buy dextrose to resell it as reprocessed dextrose. The purchasers of the candy did not buy it as "dextrose" or "processed dextrose". To hold, as did the Commission and the court below, that under these circumstances dextrose purchased by the Curtiss Candy Company comes within the language of the statute is to hold that every article that goes into a manufacturing process from which wholly different products result is an article bought for resale within the language of the statute. The decision, therefore, would affect the entire manufacturing business of the whole country in which ingredients are united to combine in a different article. We submit that such a decision is so plainly erroneous and far-reaching that it should be reviewed.

**B. This Court Should Consider Whether an Arrangement Whereby a Buyer and a Seller Cooperatively Advertise Their Respective Products Represents a Service or Facility Within the Meaning of Section 2(e).**

Under the arrangement between petitioners and Curtiss, Curtiss was not obligated to buy any dextrose or corn syrup from petitioners. Each desired to advertise its own products and to expand its field of advertising by the cooperative arrangement. The arrangement is one which obviously would be appropriate and appeal to many industries. We submit that it was error to hold that such an arrangement was prohibited by Section 2(e). Nor was the advertisement by petitioners a "service or facility" supplied by them to Curtiss. It was motivated purely by self-interest on the part of petitioners in promoting their own product, i. e., dextrose. They were not interested in promoting the sale of Curtiss candies except in so far as they were advertised as containing dextrose. Furthermore, Curtiss' advertising of its candies as "rich in dextrose" was of great benefit to petitioners. Since Curtiss' advertising was twice the volume of petitioners', it would appear that petitioners rather than Curtiss gained by the arrangement.

**C. The Decisions Below were in Error in Holding that Petitioners Discriminated Within the Intention of Section 2(e).**

There was no evidence that any candy manufacturer had desired to enter into an arrangement with petitioners similar to that entered into with Curtiss. Obviously, therefore, there was no evidence that any candy manufacturer had been refused such an arrangement. Consequently, these decisions would give to Section 2(e) the effect that a seller may not enter into such an arrangement with one buyer unless he persuades all other buyers, whether they want to

do so or not, to make similar arrangements with him. Plainly, this cannot be the law.

Moreover, petitioners were buying nationwide advertising. The record shows that Curtiss was one of few with whom a cooperative arrangement for such advertising could be made. The only other company mentioned that advertised on a comparable scale and therefore would be in a position to offer to petitioners similar benefits of such an arrangement was the Mars Candy Company, which petitioners approached but which declined to enter into the arrangement.

We submit that there can be no discrimination unless it appears that parties similarly situated, capable of entering into similar arrangements and desiring to do so, have been refused.

### Conclusion

Without discussing further the other points raised by the petition, we submit that the considerations discussed herein afford substantial justification for the petition and warrant the review prayed for therein.

Respectfully submitted,

GEORGE DEFOREST LORD,  
*Counsel for Petitioners.*

FRANK H. HALL,  
SIDNEY S. COGGAN,  
LORD, DAY & LORD,  
*of Counsel.*





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CHARLES ELMORE PROFFER

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 680

CORN PRODUCTS REFINING COMPANY, a corporation,  
and CORN PRODUCTS SALES COMPANY, a corporation,

*Petitioners,*

*vs.*

FEDERAL TRADE COMMISSION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

GEORGE DEFOREST LORD,  
*Counsel for Petitioners.*

FRANK H. HALL,  
SIDNEY S. COGGAN,  
LORD, DAY & LORD,  
*Of Counsel.*



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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**REPLY BRIEF FOR PETITIONERS**

Inasmuch as the memorandum for the Federal Trade Commission does not oppose the petition for a writ of certiorari in so far as the basing point price practices and the "booking" practices under Section 2(a) of the Clayton Act are concerned, no further argument is necessary at this time by petitioners on those points. In so far as the desirability of review by this Court on the other practices alleged to be in violation of Section 2(a) which the respondent opposes, petitioners are content to rest upon their main brief in support of the petition.

This reply is limited to the Government's contention that this Court should exclude from review consideration of the questions presented under Section 2(e) of the

Clayton Act, *i. e.*, the cooperative advertising arrangements between petitioners and the Curtiss Candy Company.

### **Reply to Point III in Respondent's Memorandum**

Petitioners have contended that these issues involve a question of statutory interpretation which is of general concern to many business enterprises and should therefore be reviewed by this Court. Respondent contends in effect that the decision below is right and, in the absence of a conflicting ruling, does not warrant review.

The court below decided that dextrose, when sold to a candy manufacturer and combined with milk, eggs, chocolate and nuts, fell within the provisions of the act covering "goods bought for resale with or without processing." The Federal Trade Commission's memorandum (pp. 11 and 12) in substance concedes that this question is one of widest importance. It states (p. 11) that the acts prohibited in Section 2(e) apply to "all goods bought for resale whether in their original form or after processing operations." The field covered by the language quoted is in itself large enough even without the absurdly enlarged interpretation given to the words "bought for resale" and "processing" by the court below and the Federal Trade Commission. But the construction of the quoted words by the court below so broadens the scope of Section 2(e) that it would include almost the entire manufacturing business of the country. Under this construction, steel would be "bought for resale" if used for the manufacture of automobiles. Automobiles would become "processed" steel. Certainly then, the question is broad enough in its dimensions to warrant review by this Court. It involves an important question of Federal law which has not been and should be decided by this Court and in which a countrywide rule is especially desirable.

Respondent, while conceding that under its interpretation the statute covers a very wide field, dismisses our

argument that it should be reviewed, with a statement that the decision below on this point "is not sufficiently doubtful to warrant review." The construction of the words "bought for resale" and "processing" by the court below is very clearly a departure from the usual construction of these words. The statute does not define the meaning of these words and there is little available authority. The decision below ascribes to the meaning of the word "processing" a wholly different interpretation from that given it under the Fair Labor Standards Act by the Eighth Circuit Court of Appeals in *Fleming v. Hawkeye Pearl Button Company* (1940), 113 F. (2d) 52. There the court held that cutting blanks from fresh water clam shells to make buttons was not processing under the act in question.

In view of the importance of the question involved, the lack of substantial available authority and the apparent divergence in such authority as does exist, this phase of the case should also be reviewed.

### Conclusion

It is respectfully submitted that a writ of certiorari should be granted in this cause and that the granting of such writ of certiorari should not be limited in its scope.

GEORGE DEFOREST LORD,  
Counsel for Petitioners.

FRANK H. HALL,  
SIDNEY S. COGGAN,  
LORD, DAY & LORD,  
Of Counsel.





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**FILED**

**JAN 19 1945**

**CHARLES ELMORE, DROPLEY  
CLERK.**

IN THE  
**Supreme Court of the United States**

**OCTOBER TERM 1944**

**No. 680**

**CORN PRODUCTS REFINING COMPANY, a corpora-  
tion, and CORN PRODUCTS SALES COMPANY, a  
corporation,**

*Petitioners,*

*vs.*

**FEDERAL TRADE COMMISSION,**

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

**BRIEF FOR PETITIONERS**

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IN THE  
Supreme Court of the United States

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**BRIEF FOR PETITIONERS**

**Opinion of the Court Below**

The opinion of the majority of the Circuit Court of Appeals (R. 527-541) is reported in 144 F. (2d) 211; and the separate opinion of Circuit Judge MAJOR (R. 541-542) is reported at page 221.

**Statement of the Grounds on Which the  
Jurisdiction of This Court is Invoked**

The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. Code, Section 347), on the ground that this is a proceeding

to review a decision of the Circuit Court of Appeals for the Seventh Circuit, that Section 240 provides for review on certiorari of such decisions, that the issues here merit review of the decision below and that a petition for a writ of certiorari was seasonably filed by petitioners on November 15, 1944.

The jurisdiction of the Circuit Court of Appeals for the Seventh Circuit rested on the provisions of Section 11 of the Clayton Act, as amended, 38 Stat. 734, 43 Stat. 939, 48 Stat. 1102, 52 Stat. 1028 (15 U. S. Code, Section 21). This Section provides that any party required by an order of the Federal Trade Commission "to cease and desist from a violation (of the Clayton Act) charged" may obtain a review of such order in an appropriate Circuit Court of Appeals by filing in the court a written petition praying that the order of the Commission be set aside.

### **Statement of the Case**

#### **The Action**

This is an action to review a determination and order of the Federal Trade Commission. It was instituted by petitioners by filing, pursuant to Section 11 of the Clayton Act, above referred to, in the Circuit Court of Appeals for the Seventh Circuit a petition praying that the Court set aside an order of the Federal Trade Commission, dated March 16, 1942, ordering petitioners to cease and desist from certain practices charged by the Commission to be in violation of Sections 2 and 3 of the Clayton Act, as amended.\* Thereafter the Federal Trade Commission, herein referred to as the Commission, filed in the Circuit Court of Appeals its cross-application under the same Section 11 of the Clayton Act, for a decree affirming the Commission's order and directing compliance therewith.

The Circuit Court of Appeals declined to set the order aside but modified it in certain respects, and by its decree

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\* The pertinent provisions of the Clayton Act are reproduced in Appendix A hereto.

dated September 18, 1944 (R. 586) it directed petitioners to obey the order as so modified. Circuit Judge MAJOR dissented. Petitioners applied for a rehearing (R. 543), which was denied (R. 593).

Thereupon, petitioners filed with this Court their petition for a writ of certiorari to review the decision and decree of the Circuit Court of Appeals. Certiorari was granted on December 18, 1944.

### **Petitioners and Their Competitors**

Petitioners are engaged in the manufacture, sale and distribution of products and by-products made from corn, including glucose (corn syrup), dextrose (refined corn sugar), starches and gluten feeds. Their principal plant is at Argo, Illinois, within the switching limits of Chicago, and they have other plants at Pekin, Illinois, North Kansas City, Missouri, and Ridgefield, New Jersey\* (R. 465).

### **The Complaints of and Proceedings Before the Federal Trade Commission**

On October 21, 1938, the Commission issued a complaint charging in general terms that petitioners were, and since June 19, 1936 had been discriminating in price in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, so-called, approved June 19, 1936 (U. S. Code, Title 15, Section 13). Hearings were held at which counsel for the Commission, over objection, questioned officials of petitioners as to numerous matters not indicated by the complaint. Thereafter, the Commission filed an amended complaint which, in three counts, charged petitioners with violations of Sections 2(a), 2(e) and 3 of said Act. Further hearings were had, briefs were filed and the issues were argued orally before the Commission.

\* At the time of the proceedings before the Commission, petitioners had a plant at Edgewater, New Jersey, but this plant was taken over by the Government as a naval medical supply base and petitioners have moved the activities formerly conducted at this plant to a new plant at Ridgefield, New Jersey.

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The Commission subsequently rendered its decision finding that petitioners since June 19, 1936 had violated or were violating the Act in the respects hereafter described and ordering them to cease and desist from the violations so found.

The issues before this Court involve only the Commission's findings and order with respect to the alleged violations of Sections 2(a) and 2(e). Before the conclusion of the Commission proceeding, petitioners had discontinued the practices charged to be violative of Section 3. Consequently, although the appropriateness of a cease and desist order with regard to facts that no longer existed was challenged in the court below, the matter is of no substantial importance and therefore has not been brought before this Court.

There are here for decision several separate and distinct questions. It is as though there were several separate cases, since the provisions of Sections 2(a) and 2(e) are quite different and the findings of violations thereof rest upon totally different facts. Indeed, as will be seen, even under Section 2(a) alone there are several quite separate and distinct cases involving different facts. Therefore, it will clarify the presentation to state separately the case with respect to each alleged violation.

#### A. Alleged Violations of Section 2(a)

Section 2(a) provides, in part:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due

allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: \* \* \*"

The Commission charged and found that several different practices of petitioners constituted discrimination in price between different purchasers within the prohibition of this provision. These practices can be conveniently referred to by, and the facts with reference thereto can be summarized under the following general headings:

1. Basing Point Prices,
2. Delayed Bookings and Deliveries,
3. Sales in Tank Car Quantities to Tank Wagon Customers,
4. Allowances and Discounts.

#### 1. BASING POINT PRICES

##### *The Facts*

The issues under this heading relate to the sale and shipment in interstate commerce of glucose or corn syrup unmixed produced at petitioners' principal plant at Argo, Ill., in the Chicago Switching Limits and at its plant opened later at Kansas City, Mo.

Corn syrup unmixed (C. S. U.) in carloads is customarily sold under contracts permitting purchasers to take delivery at any time within from ten to thirty days of date of sale (R. 40, 205, 408).

Petitioners' principal plant at Argo began operation in 1910. Petitioners at that time determined the delivered price of their corn syrup in carloads at any destination by adding to the Chicago price the carload freight rate from Chicago to that destination. In 1922, petitioners opened another plant at Kansas City. Since then, whether syrup shipped to fulfill a particular order is forwarded from petitioners' Kansas City plant or from its Argo (Chicago) plant



has been entirely within petitioners' election, and the decision has depended upon conditions at the two plants. When they opened their Kansas City plant petitioners did not change their pricing method but continuously since 1910 they have uniformly employed the same method of determining their delivered prices at different destinations, the price to all customers at a given point being arrived at by adding to the Chicago base price the freight rate from Chicago to that point, whether the corn syrup delivered under their contracts was shipped from Kansas City or from Chicago (R. 195-197, 199).

Thus all buyers at a given destination are charged the same price regardless of point of shipment (R. 409-470).

Some of petitioners' customers are located at Chicago, Illinois; Kansas City, St. Joseph and Springfield, Missouri; Fort Smith, Arkansas; Hutchinson, Kansas; Lincoln, Nebraska; Sioux City, Iowa; Waco, Sherman, and San Antonio, Texas; Denver, Colorado; and Salt Lake City, Utah (R. 195). The freight rates to these points were lower from Kansas City than from Chicago. (See Table, R. 197.) With the exception of a few sales, shipments to fulfill which were made from the plant at Chicago, Illinois, sales to purchasers located in the particular cities enumerated, other than Chicago, were customarily fulfilled by shipments from the plant at Kansas City, Missouri. Moreover, a substantial number of the sales to purchasers located in Chicago were fulfilled by deliveries out of petitioners' storage tanks in Chicago, to which glucose had been shipped by petitioners from both of their plants, while a few such sales were fulfilled by shipments to customers in Chicago directly from the Kansas City plant (R. 196).

Many of the purchasers located at the designated points also purchased glucose from competitors of petitioners (R. 195-196).

No testimony was offered by the Commission as to the effect of petitioners' pricing method, which was in general use in the industry, and of the delivered prices produced thereby upon competition and upon petitioners' customers,

but a stipulation was entered into between counsel for the Commission and counsel for petitioners which contains all there is in the record on this point. The pertinent portions of this stipulation are as follows:

"That purchasers located in the cities enumerated above are candy manufacturers who purchase glucose or corn syrup unmixed of like grade and quality for use in the manufacture of candy and are competitively engaged in the sale of such candy to various customers, including chain stores, wholesalers and retailers, located in the various states of the United States. Such glucose or corn syrup unmixed is used as an ingredient to some extent in the manufacture of most kinds of candy and is one of the major raw materials used in the production of many varieties, constituting from five to ninety per cent. of the finished weight thereof. Generally the syrup is used in greatest proportion in candies which are sold by such candy manufacturers at about a few cents per pound and at narrow margins of profit. The higher prices paid for such syrup by such candy manufacturers located in the cities enumerated other than Chicago, Illinois, result to a greater or lesser degree in higher material costs than those of manufacturers in Chicago, the degree in each instance depending upon the difference in price and the proportion of syrup used in the particular candy manufactured. As to candies priced at but a few cents per pound and bearing no differentiating name or brand, candy manufacturers may attract customers by selling such candies at only a small fraction of a cent per pound lower than a competitor. This is especially true in selling such candies to chain stores and other purchasers of large quantities, to whom such a small difference is determinative in placing their business. Under such circumstances, candy manufacturers paying the higher prices for such syrup than competitors may attempt to recover such increased costs by increasing the price of such candies or make only selected sales on a non-price or other basis. Unless other cost factors are present, the result in either case is to reduce profit *pro tanto*. This result may occur either directly through the absorption of higher syrup costs

in the sale of candies at competitive prices or indirectly through a reduced volume of sales, or the result may be to diminish the ability of those paying the higher prices for syrup to compete with those paying the lower prices. These results may be avoided or augmented by differences in the costs to such candy manufacturers of such other factors as labor, taxes, rents, insurance, other ingredients, proximity to markets and delivery of the finished candies no matter how such differences are brought about." (R. 198-99)

There was no stipulation or proof that any candy manufacturers had knowledge that they were receiving the benefit of any discrimination in price.

Some of the candy manufacturers were located at the cities enumerated before the construction and operation of petitioners' Kansas City plant, and some candy manufacturers formerly located at said cities have, since 1922, relocated in Chicago (R. 199).

#### *The Commission's Decision*

The Commission found that price discrimination in violation of Section 2(a) had occurred whenever since June 19, 1936, petitioners, having sold at a delivered price made up of the Chicago base price plus freight from Chicago to a buyer's destination, had made delivery from petitioners' Kansas City plant and the freight rate from Kansas City was less than that from Chicago (R. 464-488). Petitioners were ordered to cease and desist from the alleged discriminations (R. 489).

#### *The Decision of the Court Below*

The Circuit Court of Appeals, Judge MAJOR dissenting, agreed with the Commission's decision and entered a decree directing obedience to this phase of its order. Judge LINDLEY in the majority opinion ruled that differences in delivered prices at different destinations resulting from the basing point pricing method constituted unlawful discrimination within the prohibition of Section 2(a). He rejected the contention of petitioners that the definite assurances

given in Congress by the Committee Chairman and others that the Robinson-Patman amendment to Section 2(a) would not outlaw basing point prices and that the striking from the bill of a clause which would definitely have had this effect required the conclusion that basing point prices did not come within the prohibition of Section 2(a). He remarked that the Congressional debates indicated "only disagreement between members of the Congress as to the desirability or the non-desirability of any such practice" and that the result was "utter silence in the Act upon that subject matter." He also rejected petitioners' contention that the Commission erred in going beyond the stipulation and indulging in a conclusion which was not stipulated as to the supposed effect of the pricing method upon competition. Despite the fact that there was no stipulation or proof whatever that any purchaser knew he was receiving the benefit of the alleged discrimination, Judge LINDLEY said that there was no lack of proof on this point (R. 530-533).

Judge MAJOR disagreed and expressed the opinion that "a delivered price predicated on the basing point system does not . . . come within the proscriptions of the section (Section 2(a))" (R. 541, 542).

## 2. DELAYED BOOKINGS AND DELIVERIES

### *The Facts*

In the case of price advances, it has been petitioners' practice to accept orders for glucose at the old or lower prices for a period of usually five and occasionally ten days after announcement of price increases (R. 203). To receive the benefit of the old price, the purchaser must ordinarily call for or take delivery of the glucose thus ordered within thirty days from the date of the advance (R. 205). In certain instances, however, petitioners (a) have allowed customers to book at the old prices after the expiration of more than five days from the announcement of price increases (R. 219-220, 227), and (b) have extended the time within which withdrawals could be made by customers against orders so as to permit deliveries to



be made to customers at the old prices more than thirty days after the announcement of price changes (R. 221).

There was no evidence whatever and no stipulation as to any effect of these occurrences upon competition with or the competitive ability of either petitioners or their customers.

### *The Commission's Decision*

The Commission found that in these instances there was price discrimination in violation of Section 2(a).

Although, as stated, there was no evidence and no stipulation as to the effect of the transactions upon competition, the Commission (R. 473-74) attempted to escape this defect by treating the stipulation in regard to Basing Point Prices (R. 198-99), as though it were applicable to these instances which, clearly, it was not.

Moreover, the Commission failed to find, as requested by petitioners, that any prima facie claim of discrimination was rebutted by the uncontradicted testimony of witnesses called by the Commission, that what was done in these instances was "to meet a competitive situation which was brought upon us" (R. 220) or "because some competitor has offered them (the customers) the same proposition" (R. 227) and that when the extensions were not granted petitioners suffered a loss of business (R. 221).

### *The Decision of the Court Below*

The Circuit Court of Appeals upheld the Commission's decision on these points and directed enforcement of this phase of its order. It failed to discuss, except possibly by inference, petitioners' contention that extensions of the periods allowed for booking orders or withdrawals were matters of terms and conditions rather than of prices. Despite the complete absence of any proof or stipulation with respect to the effect of the alleged discrimination on competition, Judge LINDLEY said:

"The Commission was amply justified in finding the practices reasonably likely to diminish the buying

ability of those paying higher prices as compared with competitors paying the lower prices." (R. 534)

This indicates that the lower court considered that the alleged discrimination was unlawful because of its effect upon the competitive ability of petitioners' customers. However, the statute by its terms is violated only when the effect of alleged discrimination is to prevent competition with a customer who "knowingly receives the benefit of such discrimination". The court's decision that the discrimination came within the prohibition of the statute was therefore in conflict with its own correct finding that "no customer knows how another is being treated" (R. 533).

### 3. SALES OF TANK CAR QUANTITIES TO TANK WAGON CUSTOMERS

These transactions were treated by the Circuit Court of Appeals in its opinion along with delayed bookings and deliveries under the general heading "Discriminations from Booking Practices". However, they involve quite different facts.

#### *The Facts*

At various times petitioners have booked orders for and have sold tank car quantities to customers in the Chicago area who ordinarily purchase only in small tank wagon quantities and have no facilities for unloading tank cars. Deliveries of the quantities sold have been made to these customers by tank wagons from petitioners' storage facilities in Chicago. Petitioners' prices for tank wagon deliveries are higher than their prices for syrup delivered in tank cars to compensate for the additional cost of the tank wagon service, and in all the instances involved the customers have been charged and have paid the higher tank wagon prices (R. 254-255, 285-288).

At each time when these transactions occurred, the privilege of purchasing in tank car quantities was offered and made available to every tank wagon buyer (R. 328,



365). Indeed, at that time the tank wagon buyers argued that they were being discriminated against in favor of those who could buy in tank cars (R. 256).

Moreover, it was testified definitely and without contradiction by witnesses for both the Commission and petitioners that when petitioners sold tank car quantities to these buyers ordinarily purchasing in tank wagon lots, they did so to meet the competition of other companies competing with petitioners (R. 256, 324, 348).

There was no proof or stipulation that these transactions had or might have any effect whatever upon competition with or the competitive ability of petitioners or of their customers.

### *The Decision of the Commission*

The Commission found that price discrimination in violation of Section 2(a) had been established. It did not clearly indicate in whose favor and against whom the supposed discrimination occurred. Although the uncontradicted evidence showed that the privilege of buying in tank car quantities was made available to all tank wagon customers, it appeared to consider that there was discrimination against certain tank wagon customers and in favor of others. It did not suggest that there was price discrimination in favor of the tank wagon customers and against the tank car buyers and it could not have done so since the former were charged the higher tank wagon prices (R. 472, 473).

With regard to the effect of the alleged price discrimination upon competition, the Commission, in the complete absence of any evidence or stipulation on this point with respect to these transactions, again treated the stipulation entered into with regard to basing point prices as though it were applicable to these transactions (R. 473, 474), which it clearly was not.

Despite the very specific evidence that petitioners' actions were taken to meet similar practices of its competitors, the Commission made no finding whatever on this point.

### *The Decision of the Court Below*

The Circuit Court of Appeals upheld the Commission's decision. What has been said concerning the court's action with regard to the previous subject is equally applicable here. Furthermore, the court dismissed the uncontradicted showing that the sales in question were made to meet similar sales of competitors with the comment that the testimony "was general in character and vague in effect" and that "there was no testimony as to specific instances or facts" (R. 534). These statements were incorrect since as to these particular sales there was definite testimony regarding "specific instances" (R. 329).

#### 4. ALLOWANCES AND DISCOUNTS

##### *The Facts*

As a by-product of their corn refining, petitioners produce large amounts of gluten feed and meal which they sell and ship to approximately 3,000 different purchasers located in different states. Such feed and meal compete with similar products produced and sold by petitioners' competitors in the corn refining industry and with other types of feed produced by distillers, cotton-seed mills, wheat flower mills, and soya bean crushers. Under contracts or oral arrangements with certain purchasers who buy these products in very large quantities, petitioners have granted to them discounts or allowances below petitioners' quoted market prices amounting to 50 cents and, in some cases, 65 cents per ton (R. 108, 114, 117).

No testimony was offered as to the effect, if any, of these allowances upon competition. All that the record contains on this point is a stipulation entered into by the parties (R. 186-191). It was stipulated that the dealers to whom the allowances were granted were in competition both in the sale of prepared mixed or branded feed products and in the resale of feed and meal products unmixed, with other dealers to whom petitioners also sold, and that the allowances would be sufficient "if and when" reflected

in whole or in substantial part in resale prices to attract business to the customers receiving them and away from their competitors or to force such competitors to resell feed and meal products at a substantially reduced profit or to refrain from reselling. It was not stipulated, however, and there was no proof that the allowances ever were reflected by the customers in their prices, or ever had these effects.

It was also stipulated that in the period since June 19, 1936, petitioners sold substantial quantities of certain brands of starch to Kever Starch Company and Stein-Hall Company and that commissions or allowances from petitioners' prices were made to these concerns, while at the same time substantial quantities of these same commodities were sold at current market prices without allowances to other concerns competitively engaged with Kever and Stein-Hall. It was similarly stipulated that the allowances granted by petitioners to Kever and Stein-Hall were sufficient "if and when" reflected in whole or in substantial part in retail prices to attract business to them and away from their competitors or to force such competitors to resell such products at substantially reduced profit or to refrain from reselling. Here, again, there was no proof that the discounts ever were so reflected or ever had the results described (R. 191-193).

#### *The Decision of the Commission*

The Commission, quoting the stipulations but without any finding that the allowances or discounts ever were reflected in the sales prices of petitioners' customers or ever affected competition, found that the giving of these allowances constituted price discrimination within the prohibition of Section 2(a) (R. 474-481).

#### *The Decision of the Court Below*

The Circuit Court of Appeals upheld the Commission's decision and order.

Judge LINDLEY, in his opinion, erroneously said (R. 535) that "petitioners assert that the necessary adverse effect

upon competition must be an actuality rather than a reasonable probability". Instead, petitioners urged, exactly as Judge LINDLEY suggests, that the evidence must establish a "reasonable probability" that the allowances or discounts would have the effect on competition specified in the statute. But they argued, further, that there was no basis for assuming the existence of such a reasonable possibility unless it was shown that the discounts actually were reflected in lower prices quoted by the recipient for their products, a fact which if it had existed would have been readily susceptible of proof.

### **B. Alleged Violation of Section 2(e)**

Section 2(e) as amended by the Robinson-Patman Act provides:

"That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

### ***The Facts***

Prior to 1936, dextrose (refined corn sugar) although known to physicians and technical experts, was a new product to the housewife, the baker and the confectionery industry (R. 174). Although petitioners had been manufacturing and selling dextrose before 1936, approximately 80 per cent of their sales were to the baking industry. Petitioners desired to expand the field of dextrose and stimulate its use by other industries (R. 175). The manufacturing processes of candy makers had been developed on the basis of using ingredients other than dextrose and a great deal of research would be required before they could change their formula to include the use of dextrose (R. 175). In these circumstances, the officials of petitioners conceived the idea of finding a candy manufacturer, selling and advertising

on a national scale, who could be persuaded to use dextrose and then to publicize, through his advertising and sales media, the use of dextrose as an ingredient in his candies. Two preliminary experiments in this direction were made in a small way with the Bachman Chocolate Manufacturing Company of Mt. Joy, Pa. and with the Lewis Candy Company in New England, but these did not prove successful because these companies did not have adequate distribution (R. 61, 62, 180, 181). Then petitioners approached the Mars Candy Company on the proposition, but it was unwilling to undertake the experiment (R. 62). In 1935 or 1936, petitioners entered into negotiations with the Curtiss Candy Company for the purpose of inducing that company to use dry dextrose in its candies and to advertise them as containing dextrose. Curtiss had as wide a distribution of its candies as any candy manufacturer in the United States, was as aggressive as any other company in the business, and its national advertising over a period of ten years was almost equal to that of all the others in the field (R. 300, 301). Before Curtiss would enter into any arrangement it experimented for approximately a year with the help of petitioners to ascertain whether dextrose could be used satisfactorily in its candies (R. 175). In September 1936, Curtiss and petitioners reached an understanding for the arrangement here involved. The substance and essential features of the arrangement were as follows:

(1) The arrangement was not a part of any contract or agreement by Curtiss to purchase dextrose or corn syrup from petitioners and contained no condition requiring such purchase. Curtiss did agree to use in its candies a sufficient quantity of dextrose so that the candies might legitimately be advertised as "rich in dextrose" but Curtiss was left free to purchase dextrose from any suppliers and there were other companies than petitioners which produced and sold dextrose (R. 296, 297, 318).

(2) Curtiss agreed to show the words "rich in dextrose" on all of its wrappers and other containers,



in its display advertising and upon the uniforms of its peddlers. This was done by Curtiss at very substantial expense to it (R. 174, 179, 302, 303, 317).

(3) Curtiss agreed to and did place its national radio and magazine advertising through petitioners' advertising agency, and advertisements were worked up in which Curtiss advertised their candies as "rich in dextrose" while petitioners advertised the use of dextrose as an ingredient in Curtiss candies (R. 59, 178, 297, 299).

(4) Petitioners paid no money in any way to Curtiss. Each party paid the advertising agency for the radio and magazine advertisements placed for it by the agency. Petitioners' expenditures for their own advertising of their dextrose under the arrangement amounted to \$100,000 in 1936, \$250,000 in 1937, and \$200,000 in 1938 and 1939 respectively (R. 297). The total advertising expenditures of Curtiss for advertising its candies stood in the ratio of at least two to one to those of petitioners (R. 177). However, neither party was under any obligation to spend any definite amount or any amount at all for its advertising (R. 61, 318)..

Although not obligated by the arrangement to purchase any dextrose from petitioners, Curtiss, since the arrangement was entered into, had increased its purchases of both corn syrup and dry dextrose from petitioners (R. 291, 292). This was not pursuant to any understanding relating to the advertising arrangement (R. 293, 294).

The Curtiss Candy Company is engaged in the manufacture and sale of candies (R. 292). It is not engaged in the sale of dextrose. The dextrose and corn syrup which it purchased from petitioners were purchased by it for use as ingredients in its candies and not for resale by it as dextrose or corn syrup (R. 293).

Petitioners have offered an arrangement similar to that with Curtiss Candy to others, and petitioners' vice-presi-



dent testified that petitioners are ready at any time to enter into similar arrangements on a proportional basis with any other candy manufacturer who is willing to use sufficient dextrose in his candy to advertise it as "rich in dextrose", is willing to advertise the dextrose content as a feature of his candies, changing his wrappers and other advertising media for the purpose and whose distribution and national advertising are substantial (R. 179-180).

### *The Decision of the Commission*

The Commission found that this arrangement constituted a violation of Section 2(e) and ordered petitioners to cease and desist therefrom. It found that petitioners had not entered into a similar arrangement with any candy manufacturer competing with Curtiss, but it did not find, as it could not since there was no such proof, that petitioners had ever refused to do so or that there was any other candy manufacturer who desired or even was willing to enter into a similar arrangement. It did not mention or discuss the question raised by petitioners whether dextrose bought by Curtiss to be used as an ingredient in its candies was "a commodity bought for resale, with or without processing" (R. 481-485).

### *The Decision of the Court Below*

The Circuit Court of Appeals upheld the Commission's decision and directed obedience to its order with regard to the Curtiss transaction. The court rejected petitioners' contention that since the arrangement involved no obligation on the part of Curtiss to purchase dextrose from petitioners, it was not entered into with Curtiss as a "purchaser". With regard to the contention that the dextrose purchased by Curtiss and used by it as an ingredient in the manufacture of candy was not "a commodity bought for resale, with or without processing", the court remarked that "processing is a relative term. \* \* \* It is an act

or a series of acts with regard to the subject matter in its transformation into a different state or a different thing". It said that although dextrose may constitute only 5 per cent of "the product when it emerges in candy, and is not capable of being isolated thereafter by chemical reduction", nevertheless "Congress employed the words 'with or without processing' as an all-comprehensive term" and it held that the dextrose was purchased by Curtiss for resale "with \* \* \* processing" (R. 538). The other contentions urged by petitioners which will be discussed hereafter were likewise rejected by the lower court.

### **Specification of the Assigned Errors Intended to be Urged**

With regard to the several issues involved, petitioners will urge that the Circuit Court of Appeals erred in the following respects:

1. In its decision regarding Basing Point Prices, the Circuit Court of Appeals erred:

(a) In holding that differences in delivered prices at different destinations resulting from the basing point method constitute discrimination in price within the language of Section 2(a);

(b) In disregarding both the language and the legislative history of the Robinson-Patman amendment to Section 2(a) which make it clear that the Congress did not intend thereby to prohibit differences in delivered prices at different destinations resulting from the basing point method;

(c) In failing to hold that where contracts are made for delivery 30 days thereafter, where petitioners have two plants and do not know in advance from which plant shipment may be made, no discrimination in price results from contracting for a delivered price, the freight factor of which may later prove to be different from the actual freight.

(d) In failing to find that much more serious discrimination between customers at the same destination would result from charging them different prices dependent upon the plant from which shipment should happen to be made.

(e) In holding that the stipulated facts warranted a finding of reasonable probability that the charging of "Chicago plus" delivered prices would, where deliveries are made from the Kansas City plant, have the effect upon competition described in Section 2(a) and essential to a finding of a violation thereof.

(f) In failing to hold that there was no evidence, and no finding that any customer "knowingly" received the benefit of the alleged discrimination and that therefore no finding of a violation of Section 2(a) could properly be made based upon the supposed effect of the alleged discrimination upon competition between petitioners' customers.

(g) In failing to set aside the decision and order of the Commission as contrary to law and arbitrary, and in directing compliance with that order.

2. In its decision regarding Delayed Bookings and Deliveries, the Circuit Court of Appeals erred:

(a) In holding that extensions of time for booking orders or for taking delivery were matters of price rather than of "terms" and came within the application of Section 2(a).

(b) In upholding the Commission's finding, in the absence of any evidence, that the effect of these practices upon competition was such as to make them unlawful under Section 2(a), and in accepting the Commission's erroneous reliance upon a stipulation entered into solely with regard to basing point prices as though it were also applicable to this phase of the case.

(c) In failing to rule that the Commission's decision and order were arbitrary and that it erred in failing to give effect to the uncontradicted evidence that petitioners did these things only to meet the competition of similar practices by their competitors; and

(d) In affirming the decision of the Commission upon these matters and directing compliance with its order.

3. In its decision regarding sales to tank-wagon customers, the Circuit Court of Appeals erred:

(a) In holding that there was discrimination in price in spite of the fact that these tank wagon buyers paid the tank wagon prices and in spite of the fact that the privilege was offered to all tank wagon buyers.

(b) In affirming the Commission's finding of a violation of Section 2(a) in the complete absence of proof or stipulation as to the effect of the practice on competition and in accepting the Commission's erroneous reliance upon the stipulation regarding basing point prices.

(c) In failing to rule that the Commission was arbitrary and erred in failing to give effect to the uncontradicted evidence that petitioners did these things only to meet the competition of similar practices by their competitors; and

(d) In affirming and directing compliance with the order of the Commission upon these matters.

4. In its decision regarding discounts or allowances accorded by petitioners to certain customers, the Circuit Court of Appeals erred:

(a) In affirming the decision and order of the Commission and in failing to hold that in view of the complete lack of proof or stipulation that the discounts or allowances were ever reflected by the customers receiv-

ing them in lower prices for their products, the Commission erred in finding violations of Section 2(a).

(b) In directing compliance with the Commission's order.

5. In its decision regarding the cooperative arrangement with the Curtiss Candy Company for advertising, the Circuit Court of Appeals erred:

(a) In holding that the dextrose purchased by Curtiss for and used by it only as an ingredient in its candies, in which it completely lost its identity, was a "commodity bought for resale with or without processing" within the meaning of Section 2(e).

(b) In failing to hold that since it was no part of the arrangement with Curtiss that it should purchase dextrose from petitioners, the transaction was not with Curtiss as a "purchaser" and therefore was not subject to Section 2(e).

(c) In holding that petitioners had not accorded similar arrangements to other customers, in the face of uncontradicted testimony that petitioners were willing to make similar arrangements with other candy manufacturers with similar nation-wide advertising and methods of distribution and in the absence of any proof that there was any candy manufacturer who wanted to enter into a similar arrangement and had been refused by petitioners and that there was any other candy manufacturer who had similar advertising.

(d) In holding that the arrangement involved the furnishing to Curtiss of a service or facility within the meaning of Section 2(e), and in failing to find that by the arrangement petitioners were procuring advertising for their own product, dextrose.

(e) In affirming the order of the Commission with respect to this transaction and directing compliance therewith.



## Summary of Argument

### Argument with Reference to the Alleged Violations of Section 2(a) of the Clayton Act

POINT I. Petitioners' practice of determining delivered prices by the "Basing Point" method and the differences in prices at different destinations resulting therefrom did not violate Section 2(a).

A. The basing point method of determining delivered prices was in general use long before the Robinson-Patman amendment of Section 2 of the Clayton Act. Therefore, a decision that such prices became unlawful under the Robinson-Patman Act can be justified only if the language of that Act and its legislative history clearly indicate an intention by Congress to prohibit them.

B. Neither the language nor the history of the Robinson-Patman Act permits the conclusion that it was the intention of Congress thereby to prohibit basing point prices.

1. Section 2(a), as amended by the Robinson-Patman Act, does not by any clear language prohibit differences in prices at different destinations resulting from the basing point method. Indeed, in so far as concerns basing point prices, the amendment made no material change in the language of the statute under which such prices had not been regarded as unlawful.

2. That Congress in enacting the Robinson-Patman Amendment considered that basing point prices were not previously unlawful under old Section 2 of the Clayton Act is indicated by the inclusion in the original draft of the amendment of a clause which would have specifically prohibited them, while the intention of Congress that basing point prices should not be made unlawful is conclusively demonstrated by the fact that this clause was stricken from the amendment before it was adopted. This intention is also shown by the discussions in Congress clearly indicating that the passage of the amendment was secured upon the assurance that it did not outlaw basing point prices.



C. Even if differences in prices resulting from the basing point method may constitute discrimination in violation of Section 2(a), the record here does not support a finding of such violation.

1. Discrimination exists only when there is injury to one and benefit to another which will be eliminated by the removal of the cause claimed to be discriminatory. Petitioners, with plants at both Chicago and Kansas City, cannot be found to discriminate by selling at a delivered price made up of a Chicago base price plus freight from there, since by shipping from Chicago rather than from Kansas City they would remove what the Commission claims to be price discrimination and yet the purchaser would pay the same price as is complained of.

2. Section 2(a) is not violated by sales at basing point prices unless the effect may be substantially to lessen competition or create a monopoly or to injure, destroy or prevent competition with a purchaser knowingly receiving the benefit of discrimination. The words "may be" indicate a substantial probability rather than a mere theoretical possibility. *International Shoe Co. v. F. T. C.*, 280 U. S. 291; *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, and other cases. There is no evidence that sales at basing point prices will tend to create a monopoly in petitioners. With regard to the effect on competition between purchasers from petitioners, there can be no substantial competition unless substantial competition already exists. *International Shoe Co. v. F. T. C.*, 280 U. S. 291. The only facts in the record with regard to the effect on competition with purchasers from petitioners are the facts stated in a stipulation. This stipulation does not support a finding of probable substantial lessening of competition or injury to the ability of petitioners' customers to compete. The Commission, in finding a violation, went outside the stipulation and drew inferences therefrom. This was improper. *Koppel v. Massachusetts Brick Co.*, 192 Mass. 223; *Lumbermen's Trust Co. v. Town of Ryegate*, 61 F. (2d) 14, 17. There is no violation of Section 2(a) unless a customer knowingly receives the benefit of the alleged discrimina-

tion, and there is no proof here that any purchaser had knowledge.

3. The Commission and the court below failed to interpret and apply Section 2(a) in the light of the practical situation resulting from the fact that petitioners have two plants, one at Chicago and one at Kansas City; that contracts are made for delivery thirty days thereafter; that when the price is contracted for it is not known from what plant shipment will be made since this is within the discretion of petitioners, depending on conditions at the plants; and that different prices to purchasers at the same destination would result if petitioners were required to charge prices including only actual freight rates, which would be more serious price discrimination than the charging of different prices to purchasers at different destinations.

POINT II. Petitioners did not violate Section 2(a) in certain instances where they allowed customers more than the usual periods for booking orders or calling for deliveries.

The extensions of time for booking orders or calling for deliveries were matters of terms and not of price and therefore did not come within Section 2(a). The Commission and the court below erred in failing to find that in these instances petitioners were meeting competition. There was no evidence whatever as to the effect of these transactions upon competition.

POINT III. Petitioners did not violate Section 2(a) in selling in tank car quantities to tank wagon customers.

There was no price discrimination since these customers paid tank wagon prices and the privilege was offered to all tank wagon customers. There was no evidence of the effect of the practice upon competition.

### **Argument with Reference to Count II of the Amended Complaint Alleging Violations of Section 2(e) of the Clayton Act**

POINT I. The arrangement with Curtiss Candy Company was not made with it as a purchaser from petitioners.

Section 2(e) relates only to discrimination between purchasers. The cooperative advertising arrangement did not obligate Curtiss to purchase dextrose from petitioners and was not made with it as a purchaser.

POINT II. There is not here involved any commodity bought for resale with or without processing.

Section 2(e) relates only to transactions involving commodities "bought for resale with or without processing". Curtiss buys dextrose only for use as an ingredient in its candies along with various other ingredients. Therefore any dextrose purchased by it was not purchased for resale "with or without processing".

POINT III. There is no proof of discrimination between purchasers of dextrose for resale.

There is no proof that any of the competitors of Curtiss purchased dextrose for use in candies competitive with those of Curtiss and there is no proof that they desired to enter into a similar advertising arrangement with petitioners or that petitioners refused.

POINT IV. Petitioners did not furnish or contribute to the furnishing of any facilities connected with the processing, handling or offering for sale of dextrose purchased by Curtiss from petitioners.

The advertising arrangement was one whereby petitioners procured advertising advantages from Curtiss.

POINT V. There was no failure to accord the same arrangement to other purchasers from petitioners on substantially equal terms.

The fact that petitioners did not enter into similar arrangements with others did not establish such a failure in the absence of proof that there were other purchasers who desired to enter into such an arrangement and were refused.

POINT VI. The Commission had no jurisdiction here because the dextrose purchased by Curtiss was not sold by petitioners in interstate commerce.

## ARGUMENT WITH REFERENCE TO THE ALLEGED VIOLATIONS OF SECTION 2(a) OF THE CLAYTON ACT.

### Preliminary discussion of Section 2(a).

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, enacted June 19, 1936, provides in part:

“That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . .”

There follows a proviso:

“That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:”

It will be seen from the foregoing that the first essential of a violation of Section 2(a) by a seller is *discrimination in price* between purchasers of commodities of like grade or quality where interstate commerce is involved. The Act does not define what was intended by the word “discriminate” nor does it define “price”. Presumably, discrimination involves difference, but does it mean each and every difference in price; does it mean differences in prices charged to buyers at different destinations, and if so, what

measures the differences that are prohibited? Moreover, discrimination involves more than difference in prices; there can be discrimination between purchasers only when they stand in a competitive relationship to each other, and the difference in treatment is the source of substantial benefit to one and substantial injury to the other.

But a showing of discrimination is not alone sufficient to establish a violation of Section 2(a). It must also be proved that the discrimination has one of the specific effects on competition described in the clauses quoted in the first paragraph.

Here it will be noted that a mere possibility of a minor lessening of competition or a small tendency to create a monopoly is not sufficient to establish a violation of Section 2(a). The lessening of competition and the tendency to monopoly must be *substantial*. What the words "may be" mean is open to argument and will be discussed further hereafter. But it seems clear, as we will contend, that they must indicate something more than a vague, hypothetical or theoretical possibility and must be construed to connote existence of a reasonable probability that the alleged discrimination will have the effects upon competition specified in the statute. Hence, even if there be discrimination in price there would seem not to be a violation of Section 2(a) unless the facts show a reasonable probability that the discrimination will *substantially* lessen competition or tend to create a monopoly.

It must be borne in mind that the Clayton Act is a statute designed to prevent monopoly and the elimination of competition. It is not an anti-discrimination statute, except as discrimination may bring about the consequences at which the statute is directed.

Moreover, since the Commission's findings make it clear that it was the supposed effect of the alleged price discrimination upon competition between petitioners' customers with which the Commission was chiefly concerned, it is important to note that by the terms of Section 2(a) knowledge on the part of a buyer that he is receiving the benefit of the discrimination is essential to the existence of a violation.



Paragraph (b) of Section 2 states that when at any hearing proof has been made "that there has been discrimination in price or services or facilities furnished"

"nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

### POINT I

Petitioners' practice of determining delivered prices by the "Basing Point" method and the differences in prices at different destinations resulting therefrom did not violate Section 2(a).

The facts pertinent to this issue are stated at pages 5 to 8 of this brief.

A. THE "BASING POINT" METHOD OF DETERMINING DELIVERED PRICES WHICH PETITIONERS EMPLOYED HAS BEEN IN SUCH LONG AND GENERAL USE IN COMMERCE THAT DIFFERENCES IN PRICES RESULTING THEREFROM SHOULD NOT NOW BE HELD UNLAWFUL UNLESS PROHIBITED BY LANGUAGE SO CLEAR AND DEFINITE AS TO INDICATE BEYOND QUESTION AN INTENTION ON THE PART OF CONGRESS TO ABOLISH BASING POINT PRICING.

Petitioners' pricing method, which produced the price differences alleged to violate Section 2(a), is what economists, legislators and business men have generally referred to as the "basing point" method or practice of arriving at delivered prices.

Eugene W. Burr, an attorney for the Federal Trade Commission, testified on March 6, 1939 before the Temporary National Economic Committee (Verbatim Record, Vol. 2, No. 14, pp. 306-307):



“ \* \* \* A basing point system is one under which there are certain points of production and sometimes certain points that are not points of production, as is true in steel, that are selected as basing points, and the industry charges at any given point of destination, any location of the customer, a price which is made up of the basing point price plus the freight from that point to customer's location, and defrays the actual cost of delivery itself, the producer paying the actual cost where that actual cost of delivery differs from the freight charged from the basing point.”

Professor Frank S. Fetter, of Princeton University, testifying before the Temporary National Economic Committee on March 7, 1939, gave the following definition (Verbatim Record, Vol. 2, No. 15, p. 340):

“ ‘This basing point practice is quoting and selling in certain territory’ (that is to cover the control area) ‘homogeneous products by a formula of delivered prices identical with that of another mill or mills made up of the base price of another mill than the one selling.’ I think that is really the crux of it—the formula is based upon another mill than the one selling, ‘plus freight from that mill’, not from the mill selling.”

Walter S. Tower, Executive Secretary of the American Iron and Steel Institute, testified before the Committee on Interstate Commerce of the United States Senate, Seventy-fourth Congress, Second Session, at the hearings on S. 4055, on March 18, 1936 (at p. 273 of the record of such hearings):

“Under the basing-point method the seller quotes a ‘delivered’ price to the buyer. The ‘delivered’ price is composed of the price at the basing-point—which may or may not be the location of the seller's plant—plus freight charges from the basing point to the point of delivery.”

See, also, the record in *In the Matter of United States Steel Corporation*, Federal Trade Commission Docket No. 760, commonly known as the *Pittsburgh-Plus Case*, 8 F. T. C. 1.

The basing point method of pricing is and long has been in common use in many industries throughout the United States. During the period while the N. R. A. was in effect, the codes provided for basing points in the following industries: cast iron pipes, iron and steel, refractories, re-enforcing materials and lime. Under the Guffey Coal Act, bituminous coal was sold pursuant to Government regulation at prices which were arrived at by the basing point method (Record of Hearings on S. 4055). And then we have the famous Pittsburgh plus basis on which the steel industry sold its products. Following the Commission's decision cited above, the single basing point pricing method in the steel industry gave way to a multiple basing point practice—but the basing point feature still persisted. *Report to the President with respect to the Basing-Point System in the Iron and Steel Industry.*

At the present time the basing point method of pricing is recognized in price ceilings and orders of the Office of Price Administration, not only in heavy industries, but also in industries dealing in other commodities such as poultry (Maximum Price Regulation No. 269, C. F. R. Title 32, Ch. 11, Part 1429, Fed. Register, November 10, 1942).

In at least two cases before the Supreme Court prior to the passage of the Robinson-Patman Act there were before this Court the sales practices of industries employing the basing point method, *Maple Flooring Manufacturers Association v. United States*, 268 U. S. 563 (1925); *Cement Manufacturers Protective Association v. United States*, 268 U. S. 588 (1925). These cases involved charges of violations of the anti-trust laws and of monopolistic activities. It is significant that in neither case, despite the wide scope of the allegations, was the basing point method of determining delivered prices attacked, nor did the Court give any indication that it considered this pricing practice unlawful. Indeed in the *Cement* case, the Court discoursed on the benefits of this pricing method in avoiding monopoly and preserving and promoting competition. See also 45 Harvard Law Review 548, "*The Legality of Basing Point Systems.*"

Such being the situation, it is clear that differences in delivered prices at different destinations resulting from the basing point system may not properly be found to constitute unlawful price discrimination in violation of Section 2(a) unless the language of its provisions and the circumstances of its enactment plainly indicate that Congress intended thereby to reach and condemn the basing point method of determining delivered prices of goods sold in interstate commerce.

B. NEITHER THE LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE ROBINSON-PATMAN ACT PERMITS THE CONCLUSION THAT IT WAS THE INTENTION OF CONGRESS BY ENACTING IT TO PROHIBIT THE BASING POINT METHOD OF DETERMINING DELIVERED PRICES. A SELLER WHOSE DIFFERENCES IN DELIVERED PRICES AT DIFFERENT DESTINATIONS ARE THE RESULT OF THE USE OF THE BASING POINT METHOD DOES NOT "DISCRIMINATE IN PRICE BETWEEN DIFFERENT PURCHASERS" WITHIN THE LANGUAGE OR INTENT OF SECTION 2(a).

### 1. *The Language of Section 2(a)*

It is not charged here that petitioners discriminate in prices between buyers in the same markets. It is undisputed, for the purposes of this point, that on a given date petitioners' price is the same to all buyers at the same destination. The complaint involves the charging of different prices at different destinations and the claim is that the differences in price are improper under the circumstances of shipment. The first question, therefore, is whether the Robinson-Patman Act had the effect of prohibiting differences in price to buyers at different points.

Where two buyers located in the same city are engaged in business under the same conditions and are in competition with each other, there may reasonably be a presumption of discrimination between them if a seller charges one a different delivered price from that charged the other for goods of the same quality, shipped in the same manner and quantity. Therefore, there is no difficulty

in concluding that by making it unlawful for a seller "to discriminate in price", Congress intended to prohibit such discrimination between buyers in the same locality. But it by no means follows that the language of Section 2(a) should be construed as prohibiting differences in prices charged to buyers at different localities. Such a prohibition would involve one of two assumptions: either that all buyers everywhere must pay the same delivered price, just as one pays a quarter for a tube of toothpaste whether it be at a drug-store in Chicago or at one in San Francisco; or else that the differences in prices charged to buyers at two different destinations must conform to some particular measure or standard.

Certainly Section 2(a) neither expressly declares that the discrimination in price which it prohibits shall include differences in prices charged to buyers at different destinations nor specifies the standards by which the measure of proper and non-discriminatory price differences can be determined, except as such standards may be inferred from the vague and indefinite language of the first proviso. But it is apparent from this language that it has reference to differences in cost of delivery due to differences in method of shipment and in quantities—as for example carloads compared with less than carload quantities.

Furthermore, an indication that Section 2(a) was not intended to embrace within its prohibition differences in prices between buyers at different localities is found in Section 3 of the Robinson-Patman Act, which provides, in part, that it shall be unlawful

"to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted . . . elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; . . ."

This language, which is expressly aimed at discrimination between buyers in different localities, would appear superfluous if such discrimination were already prohibited by Section 2(a) of the Clayton Act as amended. Moreover,

we find Representative Utterback, Chairman of the Subcommittee of the House Committee on the Judiciary, during the debate in the House upon the bill which later became the Act, saying (80 Congressional Record, p. 9416):

“ . . . where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination . . . ”

But if it be conceded, for the sake of argument, that certain differences between prices charged to buyers at different destinations were aimed at by the words “discriminate in price” in Section 2(a), we search in vain for any indication as to the measure of the differences in delivered prices which were intended to be prohibited.

Had Congress intended that the differences between the transportation charges actually paid by a seller on shipments to several buyers at their respective destinations must measure the differences in the delivered prices charged to them, it could easily have so provided. Indeed, as we will see, a bill to this effect was proposed and rejected. Instead the only guide which is embodied in Section 2(a) is the vague language of the first proviso, “differentials which make only due allowance for differences in the cost of . . . delivery.” The term “due allowance” indicates a degree of flexibility but its limits are not defined. Moreover, it seems from the language that even this proviso, which is the only suggestion of a standard, is not applicable at all in the case of an article delivered to different destinations by the same method and in the same quantity.

To support the conclusion of the Commission and of the court below, it would be necessary, therefore, to resort to interpretation to give to the language used something more than its ordinary meaning. Accordingly, it is pertinent to examine the history of the legislation and the discussions in Congress for the purpose of ascertaining whether such construction of the words employed would



conform to the Congressional intent and, if not, what the purpose of Congress was.

A review of the history of the legislation and of the debates in Congress on the bills which became the Robinson-Patman Act and which amended Section 2(a) to read as it now does makes it amply clear that to interpret the words of Section 2(a) as prohibiting differences in prices resulting from the basing point method would be contrary to the intention of Congress. Such a review indicates, indeed, that when Congress passed the Robinson-Patman Act, it regarded the basing point practice as lawful and that its definite purpose was to exclude from that Act and from the Clayton Act, as amended thereby, any prohibition against or provision which would impair the use of the basing point practice in commerce.

## 2. *Legislative History*

Selling at delivered prices determined by the basing point method has not been an obscure and unknown practice which suddenly came to light in 1936. Many industries for many years have employed this practice. Its economic virtues and vices have been discussed in numerous articles, pamphlets and books.\* In 1924, the Federal Trade Commission published its famous report in the *Pittsburgh Plus* case, 8 F. T. C. 1, wherein it argued that basing point prices were economically unsound and should be outlawed and expressed its own view that they violated Section 2 of the Clayton Act, as it then was. From that time onward the Commission has crusaded against basing point prices.

It is of great significance, therefore, that until the two cases now before this Court, the *Staley* case (No. 559) and this, no court has held that sales at basing point prices were unlawful. The Commission did not attempt to enforce its views in the *Pittsburgh Plus* case, in the courts and in the twelve years which elapsed until the Robinson-Patman Act was passed in 1936, no court ruled nor, so far as we can discover, was asked to rule that sales at basing point prices

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\* A partial bibliography is included herein as Appendix B.

constituted unlawful discrimination within the prohibition of Section 2 of the Clayton Act, or were in themselves unlawful under any other statute. Indeed, during this period, this Court considered the two cases previously cited, *Maple Flooring Manufacturers Association v. United States*, 268 U. S. 563, *Cement Manufacturers Protective Association v. United States*, 268 U. S. 588, in which the basing point pricing method was present, without suggesting that it was illegal.\*

Judge LINDBERGH in his opinion (B. 530) cites the decision of the lower court in *U. S. v. Sugar Institute*, 15 F. Supp. 817, as condemning and enjoining defendants from selling "only on delivered prices . . . including zone prices." He says that upon appeal "defendants waived their assignments of error as to each of these," and that "Thus defendants were finally enjoined from selling at prices including artificial or fictional items of freight." But examination of Judge MACK's opinion in that case (pp. 845-856) and this Court's opinion, 297 U. S. 553, at pages 590 and 591, will show that it was the concerted action of the defendants in selling at delivered prices that was condemned and that there was no contention and no decision that it was in any way unlawful for an individual concern by itself to sell only at delivered prices, and no suggestion was made that these delivered prices must include only actual freight.

Despite its early report in the *Pittsburgh Plus* proceeding there is every reason to conclude that the Commission itself did not consider that basing point prices were unlawful under the Clayton Act as it was originally. It certainly did not give Congress cause to believe that it regarded basing point prices as in and of themselves prohibited by the old Section 2. For while it urged the economic objections, as it saw them, to basing point prices, it indicated its view that action could be taken against basing

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\* See in this connection 50 Harvard Law Review, 106, 107 in which the Editors express the view that the basing point system which "was considered legal under § 2 of the Clayton Act" before its amendment by the Robinson-Patman Act was not outlawed by the latter in its final form.

point prices only where there was a violation of the anti-trust laws and it stressed the desirability of new legislation which would make this unnecessary by outlawing basing point prices directly.

Thus in 1934 in its *Report to the President with respect to the Basing Point System in the Iron and Steel Industry*, at page 41, the Commission asked that the executive sanction of the basing point system which had been given under N. R. A. be eliminated so as to leave the system "open to attack on the ground that it violates the anti-trust laws", and make it possible "to go forward in formal proceeding to test the basing-point system under the Sherman Act or the Federal Trade Commission Act" (no mention of the Clayton Act). And in its *Report to the President on Prices of Sheet Steel Piling*, (1936) it said (p. 42):

"Once Congress has created an anti-basing point bill, the immense expense of separate investigations and the laborious trial of separate suits would be avoided."

Consistently with this situation in the past, the complaint in this proceeding did not allege that petitioners' basing point prices were unlawful under Section 2 of the Clayton Act as it existed from 1914 to 1936. Instead the allegation of price discrimination was limited to the period beginning June 19, 1936, the date upon which the Robinson-Patman Act became effective, and it was alleged that petitioners had violated Section 2(a) of the Clayton Act, as amended thereby. Throughout the hearings counsel for the Commission made it clear that petitioners' pricing practices were not challenged as unlawful prior to June 19, 1936.\*

Therefore it is pertinent to examine the Robinson-Patman Act to discover whether its terms indicate a change in the law whereby differences in prices resulting from the

\* See the allegations of the complaint, questions of Commission's counsel, stipulations, and the Commission's findings at the following pages of the record: 3, 9, 10, 22, 29, 30, 40, 49-51, 60, 64-66, 69, 77, 83, 85, 91, 107, 112, 155, 156, 162, 186-195, 203, 207, 241, 464, 475-80.

basing point method became prohibited. And it is appropriate also to discover whether Congress, in enacting the Robinson-Patman Act, either considered that basing point prices were unlawful under the old statute or intended to make them so by the amendment.

In the appendix herein we have set out Section 2 of the Clayton Act as it was prior to June 19, 1936, so that it may be compared with Section 2(a) as written into the law by the Robinson-Patman Act. From such a comparison it is impossible to see what new provisions could be claimed to have changed the law with respect to basing point prices so as to render them, or sales on the basis of such prices, thereafter unlawful.

Petitioners are charged with violating the provisions of Section 2(a) which makes it unlawful "to discriminate in price between different purchasers of commodities". But this language was in the old law. It is charged that petitioners' prices discriminate because the differences between prices at certain different destinations make more than "due allowance for differences in the cost of \* \* \* delivery", as measured by the freight rates actually paid. But Section 2 in its original form contained similar and indeed more precise language, to wit, "due allowance for difference in the cost of transportation." There is reason to believe that the Robinson-Patman Act was directed chiefly toward certain practices in connection with chain stores,\* and it amplified and added to the old law in such matters as quantity discounts. But none of the language in the Act as it was finally passed can by any stretch of the imagination be deemed relevant to basing point prices as such or to expand the words "to discriminate in price" so as to prohibit basing point prices when they were not previously prohibited by substantially the same words in the old law.

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\* Its proposal followed the final report of the Federal Trade Commission on the Chain Store Investigation, Sen. Doc. No. 4, 74th Congress, 1st Session, page 96. See also "The Robinson-Patman Act, Its History and Probable Meaning", the Washington Post, 1936.

Counsel for the Commission in their brief in the Circuit Court of Appeals agreed with this view saying (p. 29):

"if price discrimination through the use of the basing-point system was unlawful under the old Clayton Act, the amended Act did not make it lawful; if it was lawful under the old Act, the new Act did not make it unlawful."

Counsel for the Commission were there endeavoring to meet petitioners' argument based upon the legislative history but they incorrectly represented petitioners as arguing from the legislative history that by the Robinson-Patman Act Congress sought to legalize a pricing system which had been unlawful prior thereto.

Our argument, on the contrary, is that the legislative history makes it clear that Congress itself regarded basing point prices as legal under the old Clayton Act, and that, although there was a difference of opinion as to their economic merits, it was the definite intention of Congress that they should not be prohibited by the Robinson-Patman amendment.

What could be better proof of this fact than that there was stricken from the Robinson-Patman bill itself before its final enactment a provision which the bill originally contained which would have expressly prohibited selling on the basing point pricing system, and was intended to have this result.

The provision in question was subsection 5 of Section 2 of the Patman bill. Section 2 of this bill made it unlawful to discriminate in price and subsection 5 would have defined "price" to mean:

"The amount received . . . after deducting actual freight or the cost of other transportation."

If this clause had remained in the bill it would have constituted a definite prohibition of the very thing which is the basis of the complaint here against these respondents; namely, selling at delivered prices which, after deduction



of the actual freight charges paid by the seller on each shipment, produced different net prices on sales to customers at the same or different points. This clause was directly aimed at the basing point method of price selling.

The Federal Trade Commission in its *Report to the President on Prices of Sheet Steel Piling*, referring to this bill and its companions which were then pending, said (p. 41):

"Bills are now pending in both Houses of Congress that would make the operation of non-competitive basing point systems unlawful *per se*."

Congressman Utterback, in the report of the House Committee on the Judiciary, Report No. 2287, to accompany H. R. 8442, referring to the definition of "price" provided by this subsection 5, said (p. 14):

"In effect, this provision of the bill is designed to put an end to price discrimination through the medium of the basing-point or delivered-price system of selling commodities. It will require the use of the f. o. b. method of sale."

The inclusion in the bill of this subsection 5 expressly designed to prohibit basing point prices and the discussion of it in Congress are conclusive proof that the members of Congress regarded basing point prices as not unlawful under the Clayton Act in its old form. And there could be no more conclusive demonstration that Congress intended that the Robinson-Patman Act should not outlaw basing point prices than the fact that this subsection was eliminated from the bill before it was passed. Had it been the Congressional view that basing point prices were already prohibited by Section 2 as it previously existed, this clause to make them unlawful would not have been proposed. And had Congress desired by the Robinson-Patman Act to prohibit basing point prices, it would not have stricken out this clause which was designed to have and would have had this result. And the discussion of the bill and the

explanation given with regard to this elimination leave no doubt that this was done because the bill could not have been passed if it were to prohibit basing point prices.

This is shown by the following excerpts from the Congressional Record, Vol. 80 (Italics are added):

"Mr. Miller: \* \* \* The next amendment that will be offered by the committee as a committee amendment will be directed at *subsection (5) on page 7, which is the basing point provision in the bill.*

Mr. Rich: Does the gentleman mean to strike out the whole section? (Italics added)

Mr. Miller: *That amendment will be for the purpose of striking out all of subsection (5), or the basing point provision in the bill.* Probably that provision should not have been put in a bill amending the Clayton Act; but it was put in and the committee has decided to offer an amendment to take it out." (80 Congressional Record, p. 8106)

"Mr. Patman: \* \* \* *Farmers' organizations sent letters to all the Members saying they were opposed to certain things; I learned through their representatives in Washington 2 or 3 weeks ago they were opposed to the basing-point provision of the bill, section 5. So I took it up with the Judiciary Committee. The committee members had heard similar complaints and the committee at a meeting agreed to cut out the basing-point provision. This silenced a lot of the opposition. The basing point is not directly related to what we are trying to do, as I view it, so it was all right to cut that out.*" (80 Congressional Record, p. 8113)

"Mr. Boileau: \* \* \* *Another objection raised by these farm leaders was with respect to the anti-basing-point provision. They felt that this was a dangerous feature of the bill. I personally would rather have that anti-basing-point provision in the bill, but the committee, in its wisdom, will submit a committee amendment striking it out. The members of the steering committee believe that in order to insure its enact-*

ment we should eliminate this provision, and, although personally I would prefer that it remain in the bill, I am nevertheless willing to go along. I am pleased that in this respect we are meeting the demands of the farm organizations with whom I have always tried to cooperate, both as a member of the Committee on Agriculture and as a Member of the House, and whose views I have welcomed at all times in the consideration of this bill." (80 Congressional Record, p. 8122)

"Mr. Robsion of Kentucky: \* \* \* There were two features, however, on which we were not in full agreement. *Many of us opposed section 5, on page 7, of this bill. It is the so-called price-fixing or basing-point provision. It has been unanimously agreed that that section go out; \* \* \**" (80 Congressional Record, p. 8130)

"Mr. Miller: \* \* \* *The second amendment which the Committee on the Judiciary will offer is to lines 20 and 23 on page 7 of the committee amendment to the bill, and the amendment will be a motion to strike said lines 20 to 23, both inclusive, therefrom.*

*"This particular section which the committee will seek to strike out is designated as subsection (5) on page 7, and is what is commonly called the basing-point provision."* (80 Congressional Record, pp. 8139, 8140)

The Congressional Record reports further and extended discussion of and vigorous opposition to any attempt to prohibit basing point prices. Among others, Congressman Citron explained to the House, as one of the reasons why it was advisable to eliminate this anti-basing point prohibition, that if it were enacted, it would compel the localization of operation of all manufacturers and wholesalers and that volume production with its resultant advantages would be seriously curtailed. (80 Congressional Record, pp. 8223-8224)

That it was regarded in the Senate when the bill was there considered that the prohibition against selling on delivered prices computed by the basing point method had

been eliminated and that the Robinson-Patman Act as passed would not prohibit the basing point method is indicated by the following colloquy which took place during the debate in the Senate:

"Mr. Davis. Mr. President, if I may have the attention of the Senator from Idaho, I should like to ask him whether this proposed legislation changes in any way the present status of the basing-point plan now used by steel and cement and other natural-resource industries.

Mr. Borah. I could not answer offhand, because I am not sure that I know the exact operation of the basing-point plan in the steel industry.

Mr. Davis. *Under the basing-point plan in the steel industry the markets all over the country are available for anyone who is engaged in that industry.*

Mr. Borah. *My opinion would be that this does not have any effect upon that.* I defer to the judgment of the Senator in charge of the bill, but that would be my impression.

Mr. Van Nuys. *The Senator from Idaho is correct.*"  
(80 Congressional Record, p. 9903)\*

Further proof that Congress has not considered basing point prices as already unlawful under previous law and has not intended to prohibit selling at delivered prices computed by the basing point method, is found in the fact that other bills have been proposed to Congress containing express prohibitions against the basing point method of selling, all of which have failed of enactment. Thus, in 1936, there was pending in the Senate S. 4055 (and a counterpart in the House, H. R. 10385), which was expressly aimed at eliminating the basing point. Hearings on this bill were held before the Senate Committee on Interstate Commerce from March 9 to April 10, 1936, but the bill was never

\* Other excerpts from Volume 80 of the Congressional Record containing comments on the Robinson-Patman bill are set out in Appendix C hereto.

enacted. Another bill to the same effect which never reached enactment was S. 3744. Here again it is a necessary inference that these bills, expressly designed to make basing point prices unlawful, would not have been introduced if it had been considered that such prices were already prohibited by existing laws; and the failure of Congress to enact these bills into law plainly demonstrates its intention that sales at basing point prices should continue to be permitted.

Hence it is plain that if the intention of Congress is to be given proper effect, it must be held that Section 2(a) does not prohibit selling at delivered prices computed by the basing point method and that the words "discriminate in price" used in Section 2(a) do not embrace differences in delivered prices at different destinations arrived at by that method; that is, the method under which all buyers at each destination pay the same delivered price arrived at by adding to a base price the freight rate to that destination from a basing point, which is or may be different from the actual point of shipment of the goods to them. Whether the basing point price method is or is not desirable is a problem in economics as to which the opinions of writers and experts may differ. But this makes it all the more evident that if basing point prices are to be prohibited, this is a matter for Congress. Certainly the courts should not, as did the Commission, by a tortuous construction of simple language which does not by its terms prohibit the basing-point system, give to the statute a construction which the uncontestable evidence shows is directly contrary to the intention of Congress.

**C. Even if it should be held that such differences in delivered prices as result from the basing point method are not excluded from the purview of Section 2(a), still the record here does not establish a violation of that Section.**

If, despite the language and legislative history of Section 2(a) and contrary to the foregoing argument, it be



held that such differences in delivered prices as result from the basing point method may constitute price discrimination within the prohibition of Section 2(a), we come to the question whether on the facts here a finding of a violation of that section is warranted by the record.

1. THE RECORD DOES NOT SUPPORT A FINDING OF "DISCRIMINATION IN PRICES".

Assuming, for the sake of argument, that the freight rates actually paid afford the criterion of permissible price differences, and that the differences between petitioners' delivered prices at different destinations resulting from the use of the basing point method were greater or less than the differences in the freight rates from the points of actual shipment, still this alone would not prove discrimination, since the term "discrimination" involves something more than an unwarranted difference. Congressman Utterback, in explaining before the House the meaning of the term "discriminate" as used in the Act, said:

"In its meaning as simple English a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that *some relationship exists between the parties to the discrimination which entitles them to equal treatment*, whereby the difference granted to one casts some burden or disadvantage upon the other. *If the two are competing in the resale of the goods concerned, that relationship exists.* Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination." (80 Congressional Record, p. 9559)

It has been held under the provisions of the Interstate Commerce Act prohibiting discrimination in freight rates that discrimination is more than mere difference and does

not exist unless the difference is the cause of substantial benefit to certain shippers and of injury to others.

*Sugar from Mobile, New Orleans, etc., to Alabama and Georgia*, 237 I. C. C. 221, 226;

*Federated Metals Corp. v. Pennsylvania R. Co.*, 161 I. C. C. 287, 288;

*Bunker Hill & Sullivan M. & C. Co. v. N. P. Ry. Co.*, 129 I. C. C. 242, 246;

*Burlington Shippers' Asso. v. A. T. & S. F. Ry. Co.*, 109 I. C. C. 694, 699.

This means, as Congressman Utterback said, that there must be a competitive relationship between the buyers concerned to whom the different prices are charged.

*Kistler Leather Co. v. Pittsburg, S. & N. R. Co.*, 169 I. C. C. 247, 252.

Following this same thought, it has been held, further, under the Interstate Commerce Act that discrimination contemplates that there must be an alternative in the method by which the injury and benefit may be eliminated; that is, either by raising the price charged to the favored customer or reducing the charge to the prejudiced customer, or a combination of both, and that unless these conditions exist no discrimination is present.

*Texas & P. Ry. Co. v. United States*, 289 U. S. 627, 650;

*American Salt Corp. v. Aberdeen & R. R. Co.*, 220 I. C. C. 369, 374;

*Moline Consumers Co. v. Chicago, B. & Q. R. Co.*, 213 I. C. C. 135, 142.

In *Duluth Chamber of Commerce v. C. St. P., M. & O. Ry. Co.*, 122 I. C. C. 739, the Interstate Commerce Commission said that to prove discrimination in violation of Section 3 of the Interstate Commerce Act "it must be shown that

complainant suffers injury by reason of the discrimination, and that this injury will cease if the discrimination is removed, *regardless of the manner of its removal.*" (Italics preserved.)

In testing whether discrimination really exists on the particular facts in this case, it is appropriate, therefore, to inquire what alternative petitioners would have as to the method of eliminating the alleged price discrimination, and how their customers would be benefited thereby. For example, in the case of a candy manufacturer at St. Joseph, Mo., on the theory of the Commission he is discriminated against in favor of a competitor to whom delivery is made from Chicago if the price he pays is computed on the basis of the freight rate from Chicago when shipment is really made to him from Kansas City. But on this theory, the ground of the complaint would be eliminated if petitioners should close their Kansas City plant (as indeed they have been forced to do from time to time due to shortage of corn), or if for any reason they should ship to the St. Joseph manufacturer from Chicago. It is impossible, however, to see that the St. Joseph manufacturer would be in any way benefited thereby. He would still pay the same price for his corn syrup which is now claimed to be discriminatory, but which would then, on the Commission's theory become entirely lawful. If, on the other hand petitioners were to leave their Kansas City plant in operation and were to charge a delivered price on goods shipped from there made up of a base price plus freight from Kansas City to destination, it is entirely within the realm of probability that two customers at the same destination, one of whom was served from Chicago and the other from Kansas City, would be paying different prices on the same day, or within a period of a very few days. This would create instead of remove discrimination and would certainly cause more dissatisfaction among petitioners' customers than the present method of determining delivered prices, under which all buyers at the same point pay the same price regardless of petitioners' election as to the plant from which to ship the goods.

Hence we submit that in the situation of petitioners here, such differences in delivered prices at different destinations as result from their use of the basing point method cannot be considered price discrimination within the meaning of Section 2(a).

2. EVEN IF PRICE DISCRIMINATION HAS BEEN SHOWN, THE RECORD FAILS TO ESTABLISH A VIOLATION OF SECTION 2(a) BECAUSE IT FAILS TO SHOW THAT THE PRICE DISCRIMINATION WILL HAVE THE EFFECTS SPECIFIED IN THE STATUTE.

It is not all discrimination in price which is prohibited by Section 2(a), but a violation of the statute exists only

"where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them;

• • • "

This language requires careful examination and analysis.

(1) In the first place, what is meant by the words "where the effect • • • *may be*"? As was said in the preliminary analysis of the statute at the beginning of this point, it is submitted that these words must indicate something more than a vague, hypothetical or theoretical possibility and were intended to connote the existence of a reasonable probability. Congress is not concerned with preventing consequences whose occurrence does not appear reasonably probable within the scope of man's actual daily life. The words "may be" with similar context were found in Section 2 of the Clayton Act before its amendment by the Robinson-Patman Act and occur also in Sections 3 and 7 of the Clayton Act. Thus Section 7 prohibits the acquisition by one corporation of the stock of another

"where the effect of such acquisition *may be* to substantially lessen competition • • • , or to restrain such commerce • • • , or tend to create a monopoly of any line of commerce."

As used in Section 2(a) the words "may be" have not, so far as we have discovered, been judicially interpreted. But in a substantial number of cases the courts have interpreted these words when used in these other sections as connoting more than "a mere theoretical possibility" and as used to indicate "a substantial probability", or "actual tendency".

*International Shoe Co. v. F. T. C.*, 280 U. S. 291 (1930), at p. 298;

*Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346 (1922), pp. 356-357;

*Standard Oil Co. v. F. T. C.*, 282 Fed. 81 (C. C. A. 3rd, 1922), pp. 86-87;

*Pennsylvania Railroad Co. v. I. C. C.*, 66 F. (2d) 37 (C. C. A. 3rd, 1933);

*Temple Anthracite Coal Co. v. F. T. C.*, 51 F. (2d) 656 (C. C. A. 3rd, 1931);

*Vivaudou, Inc. v. F. T. C.*, 54 F. (2d) 273 (C. C. A. 2nd, 1931);

*United States v. Republic Steel Corporation*, 11 F. Supp. 117 (D. C., N. D. Ohio, 1935).

In the *Standard Fashion Co.* case, this Court said (pp. 356-357):

"\* \* \* But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed *probably* lessen competition, or *create an actual tendency* to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial." (Italics ours.)

Citing that case, Judge WOOLLEY, speaking for the Court in *Standard Oil Co. v. Federal Trade Commission*, said (at p. 86):

"\* \* \* To make clear the principle upon which we shall examine the testimony and decide these cases,



it may be well to observe that the Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not wait for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipency and stop their growth. Yet, in thus avoiding an objectionable effect by removing the cause, the *Congress did not intend the statute to reach every remote lessening of competition or every dim and uncertain tendency to monopoly. It intended rather that the Commission, and ultimately the courts, should inquire not whether a given practice may possibly lessen competition or possibly create a monopoly, but whether it probably lessens competition—and lessens it substantially—and whether it actually tends to create a monopoly.* (Italics ours.)

In view of the obvious similarity, both in language and purpose, between Section 2(a) and the provisions involved in these cases, the decisions cited are necessarily precedents for the construction of the words of Section 2(a). Although the question has not been expressly discussed in cases involving that section, it is perhaps significant that when this Court has upheld findings of violations of Section 2 it has appeared that the adverse effect on competition was not only probable but actual. *George Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245 (1928); *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. (2nd) 234 (C. C. A. 2nd); certiorari denied, 279 U. S. 858 (1928).

(2) The next question is whether there is substantial evidence here to support a finding of an "actual tendency" to monopoly, or a reasonable probability that the price differences between buyers at different points resulting from petitioners' delivered price practice will have one or more of the other consequences specified.

The record on this point consists only of the stipulation between counsel quoted at pages 7 to 8 above (R. 198-199).

Any finding which does not have substantial factual support in that stipulation is unwarranted.

There are two sorts of effects specified in the statute: (a) effects on competition by or with the persons alleged to discriminate, i. e., petitioners, and (b) effects on competition by or with purchasers from them.

(a) Neither in the stipulation nor elsewhere is there anything whatever bearing upon the effect of petitioners' basing point practice upon petitioners themselves or upon the line of commerce in which they, themselves, are engaged. The Commission made no preliminary finding that the practice tends to create any monopoly in petitioners in the sale of corn syrup, or that it lessened competition with or by petitioners. The Commission's conclusion that the alleged discriminations tend to create in petitioners a monopoly of the processing and refining of corn and of the sale and resale of the by-products of such processing and refining, insofar as it is concerned with the basing point practice, is, therefore, entirely without support in the evidence and entirely unsupported by Findings of Fact. It is, moreover, inconsistent with the fact that the Commission has made a similar charge with regard to all other units of the corn industry. Because obviously it is a negation of terms to say that each of several members of an industry has a monopoly.

The court below, while mentioning the Commission's conclusion as to the effect of the pricing practice upon competition with petitioners, apparently rejected it and confined its consideration to the effect upon purchasers from petitioners.

(b) Turning to the effect of the basing point pricing practice on purchasers from petitioners, is there any finding or evidence to support a finding, necessary to establish a violation of Section 2(a) that the probable effect of petitioners' basing point delivered price practice will be "to injure, destroy or prevent competition" with any candy

manufacturer who "*knowingly*" receives the benefit of the alleged discrimination?

(i) The Commission's finding was that the alleged discriminations in price, "have resulted, and do result, in substantial injury to competition among purchasers of such products" (R. 487).

For the sake of preserving the point but without indulging in extended argument here, we raise the question whether, apart from the other considerations discussed, a finding of a violation of Section 2(a) of the Robinson-Patman Act could properly be made in the absence of a showing as to particular buyers alleged to be preferred and prejudiced by the alleged discrimination and whose ability to compete is claimed to be affected.

In *Standard Oil Co. v. Federal Trade Commission*, 282 Fed. 81 (C. C. A. 3rd, 1922), the Court said (p. 87):

"Though differing somewhat from other laws, as we have indicated, the Clayton Act, nevertheless, deals with matters within the realm of monopoly. Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words 'restraint of trade or commerce' and 'monopolize, or attempt to monopolize', and by the courts in construing the Sherman Act with reference to acts 'which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade' and 'restrain the common liberty to engage therein' • • •."

The phrase "substantially to lessen competition or tend to create a monopoly" was in the original Clayton Act and while its exact meaning has never been precisely defined, it plainly connotes some fairly serious effect on competition

generally, rather than what Mr. Justice HOLMES has called "the small dishonesties of trade", affecting only the individuals immediately concerned.\*

Thus, it was held, in construing this language in the Clayton Act as it was prior to the passage of the Robinson-Patman Act, that a violation of the Act did not exist unless the evidence of a "substantial lessening" of competition was "clear, definite and convincing".

\* *International Shoe Company v. Federal Trade Commission*, 280 U. S. 291 (1930);

*Vivaudou, Inc. v. Federal Trade Commission*, 54 F. (2d) 273 (C. C. A. 2nd, 1931).

See also:

*Federal Trade Commission v. Raladam Company*, 283 U. S. 643 (1930);

*Van Camp v. American Can Company*, 278 U. S. 245 (1928);

*Porto Rican American Tobacco Company v. American Tobacco Company*, 30 F. (2d) 234 (C. C. A. 2nd, 1929).

Of course, before there can be a substantial lessening, or a substantial injury, destruction or prevention of competition, there must be substantial competition. As this Court said in *International Shoe Company v. Federal Trade Commission*, 280 U. S. 291 (1930) (at p. 298):

"Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 357; that is to say, to such a degree as will injuriously affect the

\* Gordon, "Robinson-Patman Anti-Discrimination Act", American Bar Association Journal, Vol. XXII, p. 594; 50 Harvard Law Review, 106, 108, and cases there cited.

public. Obviously such acquisition will not produce the forbidden result if there be no pre-existing substantial competition to be affected; for the public interest is not concerned in the lessening of competition, which, to begin with, is itself without real substance." (Italics ours.)

An examination of the record, including the stipulation entered into with reference to the sale of corn syrup, will show that the evidence wholly fails to meet the rule laid down by this Court in the case above cited. The stipulation contains merely the statement that the candy manufacturers who purchase syrup from petitioners "are competitively engaged in the sale of such candy". But how substantial the competition is, whether it is in the field of candies in which important quantities of corn syrup purchased from petitioners and shipped from Kansas City are used,—on such points the record is silent.

On the basis of the stipulation and in the light of the law, the most that the Commission and the court below could properly have found as to the effect of petitioners' pricing practice was something like this:

That if petitioners, for manufacturing or other reasons, fulfill a contract of sale to a candy manufacturer by shipment to him from Kansas City rather than Chicago; and if the candy manufacturer is manufacturing and selling cheap candies, sold at a few cents a pound and a narrow margin of profit, in which corn syrup is used in the greatest proportion; and if he is selling such candies to chain stores and other purchasers of large quantities to whom a small difference in price is determinative in placing their business; and if, by reason of petitioners' pricing method, he pays a higher delivered price than a price computed in some other way; and if he attempts to recover these higher costs by increasing the price of his candies or makes only selected sales on a non-price basis; and if other cost factors are not present to offset the higher price and the consequence is to reduce his profit *pro tanto* (as compared with what it would be if his price



were computed in some other way), then "the result may be to diminish the ability of those paying the higher prices for the syrup to compete with those paying the lower prices."

Certainly neither such a finding nor the stipulation itself satisfies the requirement of the statute as interpreted by the courts that the evidence shall be clear and convincing of a probable substantial lessening of or injury to competition among purchasers from petitioners.

The court below expressed the view (R. 531) that it was "irrefutable from the facts that substantial loss is reasonably likely to accrue to purchasers in the less favorably located communities". But we submit that there was no evidence to support such a statement.

It is apparent that both the Commission and the court below, instead of accepting the stipulation as the full statement of the facts, embroidered thereon and indulged in deductions and assumptions as to other facts which were not, and most certainly would not have been stipulated by petitioners. This was clearly improper.

In *Koppel v. Massachusetts Brick Co.* (Sup. Ct. of Mass., Franklin 1906), 192 Mass. 223; 78 N. E. Rep. 128; the Court stated the long established rule to be:

"Upon a submission of an action on an agreed statement of facts, the decision is to be made upon the facts actually stated. In the absence of a stipulation that inferences may be drawn from the facts stated, the question is whether the matters agreed upon establish the plaintiff's case. Neither the superior court nor this court can draw inferences of fact either for or against the plaintiff. *Schwartz v. Boston*, 151 Mass. 226; 24 N. E. 41; *Mayhew v. Durfee*, 138 Mass. 584."

In *Morse v. Fraternal Acc. Ass'n of America* (Sup. Jud. Ct. of Mass., Norfolk 1906), 190 Mass. 417; 77 N. E. 491, the same Court said at page 493:

"\* \* \* In this case the agreed facts do not show that he received the notice; and although they do con-

tain enough to warrant the court in drawing such an inference, if it were at liberty to do so, yet, in the absence of any provision to that effect, the court is not at liberty to infer the existence of any further essential facts which are not as matter of law necessarily to be inferred, but is confined to the consideration of the facts to which the parties have agreed. *Mayhew v. Durfee*, 138 Mass. 584; *Collins v. Waltham*, 151 Mass. 196, 197, 24 N. E. 327."

The rule in the Federal courts appears to be similar. In *Lumbermen's Trust Co. v. Town of Ryegate*, 61 F. (2d) 14 (C. C. A. 9th, 1932), at page 17 the Court said:

"\* \* \* Suffice it to say that where the agreed facts are the ultimate facts as distinguished from merely evidentiary facts, the ultimate facts thus agreed to have the force and effect of a special verdict. \* \* \* For it would seem clear that the stipulation of the parties as to an ultimate fact so far as it goes is at least equivalent to an admission in the pleadings, and that where the admissions in the pleadings, together with the stipulated ultimate facts require judgment in favor of the plaintiff, it is an error of law reviewable on appeal if the court enter judgment for the defendant."

An extended discussion of the subject is contained in the opinion of the same court in *Kapiolani Maternity and Gynecological Hospital v. Wodehouse et al.* (1934), 70 F. (2d) 793, at pages 797ff. The court reviewed the decisions of many jurisdictions and concluded that where a stipulation fails to state all of the ultimate facts necessary to a decision, the court should not indulge in inferences but should dismiss the proceeding or remand it for further evidence or stipulation.

To the same effect was *Elbee Chocolate Co. v. United States*, 64 F. (2d) 117 (C. C. A. 2nd, 1933).

The fact that the stipulation here may have been inexact and ambiguous does not justify inferring additional facts therefrom. In *Compania General de Tabacos de Filipinas*

*v. Collector of Internal Rev. (1929)*, 279 U. S. 306, at page 310, this Court said:

"The ambiguous phraseology of the stipulation failing to disclose precisely how the business was done, we may not speculate as to its actual character. See *Cochran v. United States*, 254 U. S. 387, 393."

(ii) Moreover, and this is important, since it is apparently upon this phase of the matter that the decisions below rest, this provision is satisfied only when the preferential price is *knowingly* received by a preferred customer. There is not a word of proof in the record to substantiate a finding that any candy manufacturer to whom corn syrup is shipped by petitioners from their Chicago plant *knows* that he is receiving the benefit of some price discrimination in his favor and against another manufacturer at another point, to whom shipment is made from Kansas City rather than from Chicago.

The Commission made no finding that any purchaser had knowledge that he was receiving a preference, and in this respect its conclusion was defective. The Circuit Court of Appeals, however, endeavored to supply the deficiency (R. 533) by arguing that the pricing method and its operation were "well known". But apart from the impropriety of indulging in such an assumption the lower court failed to recognize that it could not possibly be "well known" to any customer at the time of a contract of sale whether petitioners, thirty days thereafter would ship to him from Kansas City or from Chicago. On the agreed facts that was a matter entirely within petitioners' control and governed by the circumstances at the time (R. 196).

(c) But more than this, in connection with all phases of the effect of the alleged discrimination, it was stipulated that the consequences described in the terms "the result may be to diminish the ability of those paying the higher prices for syrup to compete with those paying the lower prices" may never happen at all. This is because it was further stipulated that

"These results may be avoided . . . by differences in the costs to such candy manufacturers of such other factors as labor, taxes, rents, insurance, other ingredients, proximity to markets, and delivery of the finished candies no matter how such differences are brought about."

The words "may be" in one sentence of the stipulation are entitled to equal meaning with those same words when used in another sentence and leave the record as showing that the result described is just as likely not to happen as to happen.

The basing point price system has been employed by petitioners for years. The period covered by the Robinson-Patman amendment extends back to 1936. Certainly if there were ever any reasonable probability that the use of the basing point method in determining their delivered prices would have the effect of substantially lessening competition or tending to create a monopoly or of injuring or destroying competition with petitioners or with any one of their customers, this probability would have become a fact demonstrable by proof of actual experience by the time the hearings in this proceeding were concluded. The Commission, however, produced not one scintilla of evidence of actual results by statistics or otherwise.

Finally, under the circumstances here, we submit, that even if the consequences upon competition specified by the statute were established by the proof, it was wholly arbitrary and erroneous for the Commission to assume that these consequences were "the effect" of the supposed discrimination in the price. The word "effect" connotes a causal connection. When a candy manufacturer at St. Joseph, Missouri, enters into a contract to purchase corn syrup from petitioners, presumably he takes into account at once in his business the price agreed upon in the contract. Therefore, any bearing which that price may have upon his own sales price or his ability to compete with other candy manufacturers is not affected in any way by whether the corn syrup delivered to him under the contract

is ultimately shipped from Kansas City or from Chicago. However, it is only if shipment is made from Kansas City that price discrimination exists under the Commission's decision—there is no discrimination if shipment is made from Chicago. Hence the existence or non-existence of the alleged price discrimination can have no relation to the buyer's competitive ability and the latter cannot be an "effect" of the former.

Under all these circumstances, it is submitted that there is no evidence sufficient to support a finding that selling by petitioners at delivered prices arrived at by the basing-point system has had as its reasonably probable effect any substantial lessening of competition or tendency to monopoly or injury to competition with any persons, either petitioners or knowing customers. The Commission's decision was therefore arbitrary.

3. IN FINDING DISCRIMINATION IN PRICE WITHIN THE MEANING OF SECTION 2(a) AND IN FINDING THAT SUCH DISCRIMINATION WOULD BE THE CAUSE OF THE RESULTS SPECIFIED BY THE ACT, THE COMMISSION'S DECISION AND ORDER WERE BASED UPON AN ERRONEOUS INTERPRETATION OF THE STATUTE AS APPLIED TO THE FACTS HERE AND WERE ARBITRARY IN DISREGARDING THE EVIDENCE AS TO THE CIRCUMSTANCES OF PETITIONERS' TWO PLANTS AND THE NECESSARY INFERENCES THEREFROM.

In determining in any particular case whether there is a violation of the statute, we urge that the words "to discriminate in price" must be given a realistic application in the light of the peculiar facts of that case.

As previously stated, the evidence shows that petitioners' main plant at Argo in the Chicago Switching Limits began operations in 1910 and that at that time petitioners adopted the practice of determining their delivered prices at different destinations by adding to a Chicago base price the freight rates from Chicago to such destinations. Twelve years later petitioners opened another plant at Kansas City, Missouri. Petitioners continued to sell at delivered prices and to enter into sales contracts with buy-



ers at different destinations, which gave these buyers thirty days after the dates of the contracts within which to call for shipment. A contract would be meaningless without a price and it was therefore obviously necessary that the contracts should provide agreements as to the delivered prices. It was stipulated on the record here that whether shipment, pursuant to a particular contract of sale, should ultimately be made from the Chicago plant or from that at Kansas City was a matter entirely within the discretion and control of petitioners, whose determination depended upon conditions at the two plants at the time of shipment (R. 196).

Under these circumstances we believe that the Commission and the court below erred in concluding that Section 2(a) should be so construed that if 25 days after a contract had been entered into and a delivered price agreed upon, the buyer should call for delivery and if at that time the petitioners, because of conditions at the plants, should elect to make delivery from the Kansas City plant, there would be price discrimination against the buyer and in favor of some other buyer at a different destination; whereas, if the Kansas City plant had been closed down or had never been built, or if for any other reason petitioners had made the particular shipment to the buyer from their Chicago plant, the same contract and the same price would not constitute discrimination within the meaning of the statute.

Moreover, under the circumstances here, with petitioners having plants both at Chicago and Kansas City and with the determination whether a particular order shall be filled by shipment from one plant rather than the other resting entirely in petitioners' discretion, prohibition of the basing point method of determining delivered prices and a requirement that petitioners charge in each instance a delivered price computed by using as one factor the actual freight charges paid on the shipment, instead of eliminating discrimination, would immediately create the possibility of more serious discrimination than can possibly exist under present practices. At the present time

all buyers in a given locality pay the same price. The basing point method or some variant thereof seems necessary to accomplish this result. For it may very well happen that because of operating conditions petitioners might have reason to ship to one buyer from Chicago and the same day fulfill a contract of sale to another buyer at the same destination by shipment from Kansas City. Certainly discrimination would be much more real if, under these circumstances, different prices were charged to the two buyers in the same community, as the Commission's order would require, than any such discrimination as is found by the Commission here.\*

The Court below failed entirely, as did the Commission, to discuss this phase of the matter which exists here because of the fact that petitioners have two plants, one of them located at Chicago, the base point. Judge LINDLEY in his opinion (R. 530) refers to the "inclusion of a fictional cost of delivery, having no justification in fact" and to "arbitrary fixation of prices discriminating illegally as between competitive customers." Certainly a method of pricing whereby petitioners are able to offer the same

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\* In the hearings before the Senate Committee on Interstate Commerce with reference to S. 4055, one of the bills designed to outlaw basing point prices, objection to the bill was made on behalf of representatives of grain millers on the ground that grain and its products generally move outbound from milling points under so-called transit or proportional rates, which vary with the initial points of origin of the grain. (Hearings before the Committee on Interstate Commerce, United States Senate on S. 4055, March 9 to April 10, 1936, pages 380 ff.) This Court is familiar with the operation of transit tariffs and proportional rates in connection with the movements of grain products. *Atchison, T. & S. F. Ry. Co. v. United States*, 284 U. S. 248; *Grain and Grain Products*, 205 I. C. C. 301. The submission of the present proceeding to the Commission was not complicated by the injection of this transit and proportional rate problem. It has been assumed that the local rates from Chicago and Kansas City, respectively, represent the freight charges actually paid. Of course, if transit or proportional rates are applicable, there may be different outbound freight rates paid on two shipments from Kansas City to a single destination, depending upon the inbound rail billing which is used. This would inject a further difficulty in maintaining equal prices for all buyers at a given destination if delivered prices which do not reflect actual freight should be done away with.

delivered price to all customers at a given destination regardless of the plant from which petitioners may be compelled or elect to ship, is not fairly described as an "arbitrary fixation of prices." And a freight factor in a delivered price which proves to be less than the actual freight charges paid is just as "fictional" as one which is higher than the freight expense ultimately incurred. Judge LINDLEY does not explain how otherwise than by their present method petitioners, having two plants and not knowing from which plant a shipment will have to be made on a given day, can on February 1 contract to sell to a buyer in St. Joseph, Mo., for shipment any time within thirty days thereafter and avoid the possibility that the freight factor in the delivered price would ultimately prove to be "fictional" because either too high or too low.

The law does not require, and neither the Commission nor the court below has held, that petitioners must sell only f. o. b. shipping point and that they are prohibited from contracting for delivered prices and for shipments over a considerable period. Neither does the statute provide, nor has it been held below, that it is unlawful for petitioners to operate two plants from which the freight rates to a common destination are different. And yet these would be the necessary consequences if Section 2(a) had the meaning and effect given to it by the decisions below.

On the same day that the Circuit Court of Appeals decided the present case, the same court rendered a decision in a companion case involving the A. E. Staley Manufacturing Company, one of petitioners' principal competitors, *A. E. Staley Mfg. Co. v. Federal Trade Commission*, 144 F. (2d) 221, now before this Court as number 559. It there held, with Judge MAJOR dissenting, that the basing point pricing system violated Section 2(a) but that since the system was in general use in the industry, the Staley Company was justified in making its delivered prices by the basing point method in order to meet competition. This Court granted certiorari in that case on November 20, 1944. The practical result of the two decisions is to give a company owning one plant which is located away

from a basing point a competitive advantage over a company which owns two plants, of which one is located at a basing point. An interpretation of the statute which produces this result must be wrong.

It seems altogether probable that, as interpreted by the Commission, the enforcement of Section 2(a) would have no other result than to discourage the decentralization of production. Thus a very important inducement for a concern like petitioners to construct an additional plant at a point such as Kansas City may well be to take advantage of greater proximity to certain markets and to secure a return on the investment in such a plant through an added profit by reason of the lesser transportation cost incurred in shipping from the new plant to those markets. In the *Cement* case, *Cement Mfrs. Assn. v. United States*, 268 U. S. 588, the court, speaking through the present Chief Justice, at pages 597 to 599 of its opinion, stressed the importance of the basing point system in thus encouraging and promoting competition between producers at different localities.

The purpose of the statute is to preserve competition and prevent monopoly by prohibiting discrimination whose probable effect would be to destroy competition and foster monopoly. It should not be given an application which will defeat its own purpose in both respects.

#### **Conclusion as to petitioners' basing point method of determining its delivered prices.**

We submit that in view of its general use in industry, and the fact that in petitioners' situation the basing point method of determining delivered prices is the most practical, the fairest to customers, the least likely to provoke charges of discrimination, and the most productive of competition, it should not be found unlawful under Section 2(a) unless it is clearly prohibited by that section in definite and unmistakable language, and unless the record convincingly shows that its use by petitioners actually has or most prob-

ably will have the consequences sought to be prevented by Section 2(a).

We submit further that far from Section 2(a) prohibiting sales on the basing point price method, such a prohibition can be read into its language only by a strained construction of the words "discriminate in price", and that the legislative history of the Act and the debates in Congress show beyond doubt not only that such a strained construction is not warranted, but that when Section 2(a) was enacted, it was the definite intention of Congress *not* to prohibit the use of the basing point price method and that such delivered price differences at different destinations as might result therefrom were not comprehended by the words "discriminate in price".

Finally, we submit that the record here utterly fails to show that petitioners' delivered price practice has or has had any of the consequences which must be found in order to render price discrimination unlawful under Section 2(a) and that the Commission's decision was arbitrary and based on errors of law.

## POINT II

Petitioners did not violate Section 2(a) in certain instances where they allowed customers more than the usual periods for booking orders or calling for deliveries.

The facts pertinent to this phase of the case are stated at pages 9 and 10 of this brief.

A. THE TRANSACTIONS DISCUSSED DID NOT INVOLVE PRICE DISCRIMINATION WITHIN THE INTENT OF SECTION 2(a).

Despite its indefiniteness in many regards, Section 2(a) is precise in one respect: namely, that the only thing that comes within its prohibition is "to discriminate in price". As we have said before, the statute does not define what is meant by "price" or "discriminate in price", but at least the use of the single word "price" is significant. Every contract of sale contains provisions not only as to



price but as to terms and conditions. Had Congress intended to prohibit not only discrimination in price but also discrimination in terms and conditions in connection with sales, it could and should have done so by appropriate language, and the absence of any reference to "terms and conditions" requires the conclusion that price was the only element of sales contracts within the prohibition of the statute.

That paragraph 2(a) deals only with "price" and not with "terms and conditions" is indicated clearly by the fact that, as originally reported to the Senate, the bill did prohibit discrimination not only in price but also in "terms of sale" (Senate Report No. 1502, 74th Congress, 2nd Session); and that the latter words were deleted by the Conference Committee before the bill was enacted into law. The Conference Committee said:

"The managers were of the opinion that the bill should be inapplicable to terms of sale except as they amount in effect to indirect discrimination in price *within the remainder of the subsection.*" (Italics ours.) (House Report No. 2951, 74th Congress, 2nd Session, p. 5.)

And this is emphasized by "the remainder of the subsection", paragraphs (c), (d) and (e), which specifically prohibit certain terms and conditions or discrimination therein. If all terms and conditions which might affect the value of the consideration involved in a sale were embraced within the term "price" in Section 2(a), these other paragraphs would be superfluous.

Consequently, in the instances where petitioners allowed purchasers to take delivery of goods ordered by them at the old price more than thirty days after the announcement of a price change, Section 2(a) was not violated because there was no discrimination in the price contracted for; there was merely a change in the terms as to the time within which orders for delivery had to be placed.

Looked at in another way, what was done in these instances amounted, in effect, to making a contract for future delivery of a commodity with one customer while refusing to make the same kind of contract for the same future

delivery with another customer. It is submitted that this is the sort of situation which falls within the third proviso of Section 2(a), which reads as follows:

"That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

B. TO THE EXTENT, IF AT ALL, THAT ANY OF THESE TRANSACTIONS INVOLVED PRICE DISCRIMINATION, THE ALLEGED LOWER PRICES WERE MADE IN GOOD FAITH TO MEET THE EQUALLY LOW PRICES OF COMPETITORS.

With respect to these alleged discriminations, the record shows quite clearly, and certainly at least as clearly as it shows the "discriminations" themselves, that these several variations from their regular practices were made by petitioners in order to meet competition.

Thus, as to the acceptance of orders at the old price more than five days after a price change, Witness Cull, called by counsel for the Commission and asked over objections whether he knew of any such instance, said that he could not recall any; "there might have been an order here and there", but that "it was a rather exceptional situation and *it would only be one in order to meet a competitive situation which was brought upon us*" (R. 220). (Italics added)

Questioned further, the same witness said: "If that were done, *it would be because some competitor has offered them the same proposition;*" (R. 227) and that "There have not been any such cases of undue lapse of time, but in cases where there was some justification for it" (R. 227).

With reference to the delivery of corn syrup after the expiration of the thirty-day shipping period at the old lower price, the same witness who testified as to this variation also testified that it was due to competitive conditions (R. 220, 221). He knew of only one customer as to which this had been done and remembered "on a couple of occasions of shutting off this account on the expiration date

and suffering a loss of business." And he testified, "we were told . . . that the original loss of business was because others carried them along so we found it was necessary to protect the business that way, by making a little longer delays" (R. 221).

Under the doctrine expressed by this Court in *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 197, and in *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568, 580, that an administrative agency must make findings of fact on all matters concerning which substantial evidence has been received, petitioners were entitled to a finding based on the undisputed evidence that, as to these practices, petitioners were meeting competition. See, also, *A. E. Staley Mfg. Co. v. Secretary of Agriculture*, 120 F. (2d) 258 (C. C. A. 7th, 1941); *A. E. Staley Mfg. Co. v. F. T. C.*, 135 F. (2d) 453 (C. C. A. 7th, 1943).

The majority of the Circuit Court of Appeals, however, concluded the portion of their opinion dealing with these practices with the remark that

"If petitioners' prices were arrived at in the same manner, to approve the defense we would be driven to the inconsistent position of approving one evil practice because it was indulged in in order to meet a similar evil practice."

With all respect, it is submitted that here the court was attempting to substitute its judgment for that of Congress as to what the statute should provide. For the statute definitely contemplates that, when there is discrimination, it is excused if it is the result of meeting competition in good faith. This is not a statute against discrimination *per se*, but against monopoly. It would defeat the purpose of the statute to hold that petitioners could not compete with others in their field by meeting their prices and terms.

C. THERE IS NO PROOF WHATEVER THAT THESE TRANSACTIONS HAD ANY EFFECT UPON COMPETITION.

These transactions were not the subject of stipulation. The Commission made its case entirely through the testi-

mony of witnesses. It had ample opportunity to produce evidence that the effect or probable effect of these transactions was either a substantial lessening of competition between petitioners and other concerns in the corn industry or injury to competition among petitioners' purchasers, if such had been the fact. No evidence of this character was produced.

Consequently, we submit that a *prima facie* showing was not made that these transactions were in violation of Section 2(a) and that the Commission's findings of such violations were wholly arbitrary.

The arbitrary character of the Commission's action in this particular is emphasized by what the Commission actually did. It so arranged its findings and conclusions as to have it appear that it did make findings on this point with regard to these transactions. It did this by describing these transactions in Paragraph Six of its Findings of Fact, while in Paragraph Seven it made various findings regarding the effect of price differences upon candy makers and their competitive ability (R. 471-474). However, the matters set forth in Paragraph Seven were based upon a stipulation which was entered into by the parties solely with reference to differences in delivered prices resulting from the basing point method and petitioners' so-called container differentials, and this stipulation and the facts therein agreed to had nothing whatever to do with delayed bookings and deliveries. The Commission's action was, therefore, quite improper in endeavoring to have the contrary appear.

The court below was either misled by this action of the Commission or else indulged in assumptions without support either in the Commission's findings or in the evidence, when, through Judge LINDLEY, it said:

"The Commission was amply justified in finding the practices reasonably likely to diminish the buying ability of those paying higher prices as compared with competitors paying the lower prices." (R. 534)

Moreover, the court's decision completely overlooks the requirement of the Act that where the claimed effect is upon competition, by or with customers it must appear that the customers "*knowingly*" received the benefit of the alleged discrimination. Had the lower court not overlooked this provision of the statute it could not have affirmed the Commission's conclusion because the court itself correctly found with respect to these transactions that "no customer knows how another is being treated" (R. 533).

### POINT III

**Petitioners did not violate Section 2(a) in selling in tank car quantities to tank wagon customers.**

The facts pertinent to this point are stated at pages 11 and 12 hereof.

**A. THE COMMISSION AND THE COURT BELOW ERRED IN FINDING THAT THESE TRANSACTIONS VIOLATED SECTION 2(a).**

What has been said in the previous point with regard to the lack of proof of any consequences of the transactions there discussed upon competition is equally applicable here.

Here there is even clearer and more specific proof that petitioners made these sales as they did under the compulsion of competition (R. 256). There is undisputed testimony in the record that the Hubinger Company had offered to sell tank car lots at the same price to the Crystal Pure Candy Company, which was normally a tank wagon buyer (R. 348, 349), and that Union Starch and Refining Company had also made the same offer to Peanut Specialties Company (R. 329, 330, 364).

Moreover there were present here two further facts completely ignored in the decisions below: first, that there was no price discrimination because the prices charged were petitioners' current prices for tank wagon sales (R. 268, 271, 373); and second, that there was no discrimina-



tion because petitioners offered the privilege to the entire tank wagon trade (R. 362-365).

Finally, we can find in Section 2(a) no prohibition against selling a tank car quantity to a customer, merely because he has usually purchased in smaller lots, provided that, if delivery is made in tank wagons, he pays the price for such delivery. That was the case here.

#### POINT IV

**Petitioners did not violate Section 2(a) by according allowances or discounts to certain customers.**

The facts on this question are stated on pages 13 and 14 hereof.

A. IT WAS ERROR TO FIND THAT THESE PRACTICES VIOLATE SECTION 2(a) BECAUSE THERE IS NO PROOF THAT THEY HAVE THE EFFECT ON COMPETITION SPECIFIED BY THAT SECTION.

The record contains no proof of any complaint by any feed dealer or purchaser of feed and meal from petitioners or by any starch dealer or purchaser of starch from petitioners or of any injury suffered from the allowances accorded to the concerns described. There is no proof of any actual tendency to a monopoly in any line of commerce affected. All that the record shows as to the effect of the allowances or discounts in connection with the sale of gluten feeds and meal is a stipulation that in each case they were

“sufficient, if and when reflected in whole or in substantial part in resale prices, to attract business to” (the several recipients) (R. 188-9, 190).

But *there is no evidence that they ever were so reflected* in the resale prices at any time during the entire period of years during which the contracts were in effect. It is submitted that this conclusively negatives the possibility of a finding that the reasonably probable effect of the con-

tracts and the allowances or discounts thereunder, was a substantial lessening of competition or an actual tendency to create a monopoly or a substantial injury to or destruction of the competition of others with the recipients.

Had such recipients cut their prices, it might, perhaps, have been a proper subject of inference that this would tend to give them a monopoly and adversely affect the selling ability of the buyers from petitioners. This might have been confirmed, if it were the fact, by proof that the sales of these recipients increased. But before the inference could be indulged at all it was necessary that it be shown that the allowances and discounts really were reflected by the recipients in their resale prices. This was a matter susceptible of proof were it the fact. No proof was offered. Petitioners did not and certainly would not have stipulated that such was the fact.

True, the stipulation states further that the allowances or discounts to the recipients concerned were

“sufficient to substantially increase their respective margins of profit over and above the margins of profit otherwise obtainable in the resale of such feeds and meal products.” (Stipulation, paragraphs 11, 19; R. 189, 190.)

There is nothing in the law, however, which fixes the amount of profit which a concern may earn. And there was no proof that the recipients used their increased profits in greater sales promotion. For all that the record shows, it is reasonable to assume that they distributed their profits, if there actually were any, to their stockholders, and left the competitive situation undisturbed. And this is not prohibited.

With respect to the discounts or allowances in connection with the sale of starch, the stipulation similarly states the possible effects of what was done upon the competitive situation, but there was likewise an “if” in this stipulation. There is no indication that during all the years when the alleged discrimination went on it ever actually resulted.

in any competitor losing a customer or in his competitive ability being impaired or in any actual tendency to a monopoly in those concerns receiving the discounts or allowances.

It is submitted that in the light of the previous argument and the decisions requiring proof of a real probability of substantial lessening of competition or an actual tendency to the creation of a monopoly, there can be no proper finding here of a violation of Section 2(a) to support a cease and desist order. Here, again, the Commission's order was arbitrary.

**ARGUMENT WITH REFERENCE TO  
COUNT II OF THE AMENDED COMPLAINT  
ALLEGING VIOLATION OF SECTION 2(e)  
OF THE CLAYTON ACT.**

The facts with respect to this phase of the case are stated at pages 15 to 18 hereof.

**Preliminary Discussion of Section 2(e)**

Section 2(e) of the Robinson-Patman Act reads as follows:

"That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

Analyzing this paragraph, it is plain that a violation thereof is not established unless there is first shown discrimination in favor of a *purchaser*. If a party is not a purchaser, then discrimination in his favor or against him is not within the prohibition of this paragraph.

Secondly, he must be a purchaser of a "commodity bought for *resale with or without processing*". If he buys a commodity for use or for consumption or for any purpose other than *resale*, Section 2(e) is not applicable. And there is of course a question as to what is meant by "processing".

In the third place, the discrimination must be between two parties *as purchasers*. A discrimination which may be made between two parties in some other connection than as purchasers is not prohibited by Section 2(e).

Further, the discrimination must be of a particular kind. It must be discrimination accomplished by contracting to

furnish or furnishing or by contributing to the furnishing of services or facilities *connected with* the processing, handling, sale or offering for sale of "such commodity so purchased", which means of the commodity bought for resale.

And lastly there is no discrimination unless these things are done upon terms not accorded to all purchasers on proportionally equal terms.

### POINT I

The arrangement with the Curtiss Candy Company was not made with it as a "purchaser" from petitioners.

It is submitted, in the first place, that Section 2(e) has no application here for the reason that the arrangement was not made with Curtiss Candy Company as a purchaser and therefore could not constitute discrimination "in favor of one purchaser" within the intent of the statute. This seems plain upon the record. The arrangement was made with the Curtiss Candy Company not because it bought dextrose from petitioners and as a purchaser of such dextrose, but because it was a candy company with a great distribution of its products and a very large national advertising program. The record shows that the purchase of dextrose by Curtiss from petitioners was no part of the arrangement. The arrangement held, even if Curtiss purchased all of its dextrose and all of its corn syrup from other suppliers. Therefore, whether or not the arrangement was discriminatory in favor of Curtiss and against somebody else, it was not discrimination by petitioners between *purchasers*.

The court below disagreed with this contention saying that the large amount spent by petitioners for advertising, coupled with the fact that their sales of dextrose and glucose substantially increased, was sufficient to support the inference that the arrangement was made for the purpose of "building up petitioners' sales of dextrose to it and to others" (R. 537). Naturally, the only purpose of petitioners in advertising is to build up their sales to the public generally. But granted that fact, it is submitted that with the witnesses for the Commission and petitioners testi-



fyng without contradiction that the advertising arrangement had no relation to sales to Curtiss and that under it Curtiss was not obligated to buy any dextrose from petitioners, it cannot properly be found that this transaction was entered into with Curtiss as a purchaser. Curtiss' purchases were outside this arrangement.

Any other view of the situation than that here suggested would have the strange result that while petitioners could legally make such an advertising arrangement with a candy company which had not bought from it, it could not thereafter sell a pound of its product to that candy company without risking a charge of violating the law.

## POINT II

There is not here involved any commodity bought for resale "with or without processing".

Curtiss is engaged in the manufacture and sale of candy, not in the sale of dextrose. The Commission has found that the dextrose purchased from petitioners by Curtiss Candy Company was purchased for use by it as an ingredient in the manufacture of candy, which candy was to be sold by the Curtiss Candy Company. The question under this point is whether when Curtiss has purchased dextrose, has then mixed and boiled or cooked it up with glucose, peanuts, chocolate, artificial flavoring, etc., and has thus produced another commodity called "candy", and has thereafter offered for sale the candy thus produced or manufactured, it is proper to find that the dextrose was purchased by Curtiss "for resale with or without processing" within the terms of the statute.

The word "for" in the phrase "bought for" implies a definite purpose on the part of the purchaser.

It is not contended that Curtiss bought dextrose "for resale . . . without processing". Obviously it did not. It would be impossible to pick out the grains of dextrose in their original state from a "Baby Ruth", one of the popular candies sold by Curtiss.

Can it be said with any reasonableness that if and when Curtiss bought dextrose from petitioners to be used as an ingredient in its candies, it did so for the purpose of processing it and reselling "processed dextrose"? To do so would seem like saying that a shoe manufacturer buying leather to make a shoe or thread to sew it up, buys these articles for the purpose of reselling processed leather and processed thread rather than shoes.

We have been unable to find in the reports of the Senate and House Committees or in the debates on the Robinson-Patman bill anything which aids in defining the term "processing" as used in the bill.

In *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8th, 1940), it was held that the manufacture of buttons from fresh water clam shells was not processing within the meaning of Section 13(a)(5) of the Fair Labor Standards Act of 1938, which exempted from the provisions of Sections 6 and 7 of the Act:

"... any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or by-products thereof."

Webster's Dictionary defines "processing" (in addition to clearly inapplicable definitions) as follows:

"To subject (especially raw material) to a process of manufacture, development, preparation for the market, etc.; to convert into marketable form, as live stock for slaughtering, grain for milling, milk by pasteurizing, fruits and vegetables by serving and packing."

We submit that the term "processing" as used in Section 2(e) must connote the subjection of a material to treatment which leaves the material recognizable as still being

the same article and not merely an ingredient or unit of a new article; as, for example, the planing of wood, the rolling of iron, the ginning of cotton; the canning of vegetables, the milling of grain, the repacking of goods, etc. It does not mean the melting and mingling of a commodity as an ingredient with other materials to produce a different article with a separate and different purpose and a use of its own, so that the original ingredient can only be retrieved by a complicated chemical or mechanical operation which destroys the new commodity.

The record indicates clearly that the dextrose sold to Curtiss by petitioners was changed in its own form and combined with other materials to produce a totally different product, namely, candy. While in a sense there is dextrose in candy, as there is salt in a soup or oxygen in water, it is no longer in a form which makes it suitable for purposes for which dextrose, as such, is ordinarily employed. It is no longer available for use for intravenous injections, for use in the baking of bread, for use in the canning of fruits or vegetables, etc. In fact, without chemical analyses, one could not even tell that the candy contained dextrose.

This was recognized by the lower court. The reasoning by which Judge LINDLEY (R. 538) reached the conclusion that the dextrose purchased by Curtiss was a "commodity bought for resale with . . . processing" would bring every ingredient, raw material or component of any manufactured article within the terms of this statute. Had Congress so intended, it could have used a much simpler and more understandable term than "commodity bought for resale with . . . processing". Judge LINDLEY remarks that "processing is a relative term". But as interpreted by him it relates to everything.

The decisions cited by Judge LINDLEY are remote from the problem here and do not aid in the interpretation of the statute involved in the present case. In both *Cochrane v. Deener*, 94 U. S. 780, and *Sharpless Co. v. Crawford Farms*, 287 Fed. 655 (C. C. A. 2d), the Court discussed the meaning of the word "process" as a noun, in considering whether the "process" under consideration in each case

was patentable. But plainly the noun "process" may have a very different scope from the same word when used as verb or participle. Moreover, in both cases there was more reason for using the word even as a verb than there is here, since in both the commodity involved did not lose its identity. *Cochrane v. Deener* involved a process for "bolting" flour; that is, apparently, grading it. The *Sharpless* case involved a "process" of blending cheese. But the flour and the cheese remained flour and cheese.

We may agree that the manufacture of candy is a "process" (noun). But to give to the word "processing" in Section 2(e) the meaning attributed to it by the lower court and the Commission would require the conclusion that the product sold by Curtiss was not a single article "candy" but "processed dextrose", "processed sugar", "processed nuts", "processed chocolate", etc.

The third case cited by Judge LINDLEY is *Bedford v. Colorado Fuel & Iron Corporation*, 81 P. 2d, 752 (Colo.). This case involved a sales tax on sales of tangible personalty which "enters into" the "processing" of or becomes an ingredient or component part of a product. Plainly, this decision is not helpful here.

The question here is largely one of first impression and the language must be interpreted as it is used in this statute. We submit that to say that Curtiss bought dextrose "for resale . . . with processing" would do violence to common sense use of words. To be sure, it is probable that one of the things which prompted Curtiss to enter into the advertising arrangement may have been a hope on its part that if its candy was proclaimed to contain dextrose with its "energy value", this would promote the sale of the candy. But this is no more than occurs if a baking company, to promote its sales, advertises that it uses iodized salt in its bread. It would hardly be said that the bread was therefore processed salt and that the baking company bought salt for processing and resale.

It is submitted, therefore, that the dextrose purchased by the Curtiss Candy Company from petitioners was not purchased "for resale with or without processing."

### POINT III

**There is no proof of discrimination between purchasers of dextrose for resale.**

Even if it be conceded for the purpose of argument that the dextrose purchased from petitioners by Curtiss was purchased by it for the purpose of resale processed, this does not establish a case of discrimination. The discrimination prohibited by Section 2(e) must be discrimination between two or more purchasers, both of whom are purchasers of the commodity in question for the purpose of resale.

As the only proof of discrimination, counsel for the Commission inquired of the president of Curtiss whether his company competed with certain other companies which he named, i. e., Nutrine Candy Company, E. J. Brach & Sons, M. J. Holloway Company, and Chase Candy Company. The record shows that the witness testified that the Nutrine Candy Company was not as large a competitor as many others because they were more in the bulk field; that Brach was more of a competitor than Nutrine, but not as much so as other companies; that Holloway would be a competitor and that Chase Candy Company of St. Joseph, Mo., would be a competitor only locally in their district (R. 301). The quantities of dry dextrose sold by petitioners to these concerns in the years 1936 to 1939 were stipulated. There is, however, no evidence whatever in the record that these concerns used petitioners' dry dextrose in their products, nor is there any finding by the Commission that the dextrose sold by petitioners to these companies was so used. While it may be presumed that having purchased dextrose, these concerns used it for some purpose, and that being candy manufacturers they probably used it in the manufacture of candy, still a finding of a violation of a statute cannot be predicated upon such assumptions of matters of fact, which should be readily susceptible of proof. For all that appears, these companies that are manufacturing candy may also make other products and may use the dextrose in these other products.



Moreover, even if they made nothing but candy, it cannot be properly assumed without proof that they used dextrose in the production of candies which were in competition with the candies manufactured by Curtiss.

Furthermore, a necessary issue here is whether not only Curtiss but also these other companies who purchased dextrose from petitioners did so for the purpose of resale. Evidence as to what they actually did was plainly essential and to support the order a finding was also necessary. Without both there is no basis for a conclusion that Section 2(e) was violated. If, like Curtiss, they used the dextrose in the manufacture of their candies, then for the reasons stated in the last point, they, too, were not purchasers of dextrose for resale.

It is submitted also that discrimination has not been shown unless it has been proved that the difference in treatment has been and is the cause of substantial benefit to one and of substantial injury to another of two or more competitors under similar conditions. Here there is no proof that any one of the four concerns named has suffered injury or that the arrangement with Curtiss was of a sort which these four concerns desired or sought and which petitioners denied to them. Certainly it cannot be held that a seller, in order to avoid the charge of discriminating in services or facilities to purchasers must force upon them arrangements which they have not sought and, so far as the seller knows, do not desire.

#### POINT IV

Petitioners did not furnish or contribute to the furnishing of any facilities connected with the processing, handling or offering for sale of dextrose purchased by Curtiss from petitioners.

From petitioners' standpoint, the object of the arrangement between petitioners and Curtiss Candy Company was to publicize the use of dextrose as an ingredient which could be used in the manufacture of candy. This publicity

was of immense value to petitioners. Petitioners did not enter into the arrangement as a service to Curtiss. Instead petitioners procured from Curtiss the great benefit of having Curtiss advertise that it used dextrose and that its candies were "Rich in Dextrose."

Moreover, since the arrangement contained no terms as to the purchase by Curtiss of dextrose or glucose from petitioners, imposed no obligation regarding and was not conditioned upon such purchase, but was effective entirely independently of the existence or non-existence of a relation of seller and purchaser between petitioners and Curtiss, it cannot be said that it was "connected with" the processing, handling or offering for sale of dextrose purchased by Curtiss from petitioners.

#### POINT V

**There was no failure to accord the same arrangement to other purchasers from petitioners on substantially equal terms.**

Judge LINDLEY, in writing the opinion of the lower court, said that the statute was satisfied

"by proof of special services rendered one purchaser not rendered to similar competing purchasers engaged in the same business and using the same commodity for the same purpose."

This was said in rejecting petitioners' contention that even if Section 2(e) were otherwise applicable, discrimination between purchasers had not been shown.

It is a fact, of course, that except for Bachman and Lewis, petitioners had not entered into a similar cooperative advertising arrangement with any candy manufacturer other than Curtiss. But is the test of discrimination what petitioners actually "rendered" or what they offered and were willing to render? Was there discrimination against Mars with whom petitioners sought to make a similar arrangement but who declined to do so?

The record clearly indicates that petitioners had offered a similar arrangement to others before offering it to Curtiss Candy Company and had in fact entered into similar arrangements with at least two other candy manufacturers. Petitioners' officers testified to their willingness to make similar arrangements with other concerns whose circumstances as to distribution, advertising, etc., would make the terms and conditions similar. There is not a word of proof as to any purchaser who sought such an arrangement and was refused, or who even expressed a desire for it. In fact, it was testified that no other customer had done so. The word "accord" certainly does not require that an arrangement must be *forced* on every purchaser, especially when, in order to use dextrose and be able to advertise candies as "Rich in Dextrose", it is necessary for a candy manufacturer to alter his formulæ, to add new ingredients to his product and to change his wrappers and containers, all of which involve both risk and expense.

The phrase "on proportionally equal terms" has never been judicially construed so far as we are aware. Clearly, however, this cannot refer to mathematical proportions such as would force petitioners, merely because they were making profitable investments, to make other expenditures which would cause them to lose money.

Moreover, discrimination connotes different treatment of parties similarly situated. If a seller seeks national advertising it cannot be discrimination if he enters into an arrangement with one customer who provides national advertising and fails to enter into an arrangement with another customer who does not advertise nationally.

## POINT VI

**The Commission has no jurisdiction here because the dextrose was not sold by petitioners in interstate commerce.**

Section 2(e) of the Clayton Act as amended is not, by its terms, limited to transactions in interstate com-

merce. However, this section should be construed as applying only to interstate transactions because, if otherwise construed, it would be unconstitutional as exceeding the power of Congress under the Commerce Clause of the Constitution. Furthermore, Sections 2(a), 2(c), 2(d), and 2(f) of the Act, by their terms, apply only to transactions "in the course of such commerce", and since all these sections are *in pari materia*, they should be construed similarly.

In the instant case, the record is completely barren of any evidence that the dextrose sold by petitioners to Curtiss Candy was sold in interstate commerce and since Curtiss is located at Chicago, Illinois, the same state in which petitioners' largest plant is located, presumably no interstate movement was involved. The same is true of the sales to the competitors of Curtiss to whom dextrose was sold, with the probable (although not proven) exception of the sales to the Chase Candy Company of St. Joseph, Mo. Furthermore there is no evidence that the transactions complained of, although not themselves in interstate commerce, have in any way affected such commerce. Under the circumstances, therefore, the Commission had no jurisdiction to deal with the Curtiss arrangement. *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349 (1941).

We submit that the Commission's decision that petitioners' arrangement with the Curtiss Candy Company violated Section 2(e) was based upon errors of law and was without support in the evidence and arbitrary.

### **Final Conclusion**

For the reasons discussed herein, it is submitted that the decision of the Circuit Court of Appeals, in so far as it dealt with alleged violations of Sections 2(a) and 2(e) of the Clayton Act, should be reversed and that the Commission's findings, conclusion and order in so far as they deal with matters alleged under Counts I and II of the amended complaint of the Commission, alleging violations of Sections

2(a) and 2(e) of the Clayton Act, should be set aside and annulled.

Respectfully submitted,

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January 15, 1945.



## Appendix A

### Pertinent Provisions of the Clayton Act

SECTION 2, before the enactment of the Robinson-Patman Act:

"SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession, or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

SECTION 2(a), as amended by the Robinson-Patman Act:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale, within the United States or any Territory thereof

or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

#### SECTION 2(e):

"That it shall be unlawful for any person to discriminate in favor of one purchaser against another

purchaser or purchasers of a commodity bought for re-sale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

## **Appendix B**

### **Some Discussions of the Basing-Point System.**

*In the Matter of U. S. Steel Corporation*, F. T. C. Docket No. 760, 8 F. T. C. 1 (1927).

FETTER, *The Masquerade of Monopoly* (1931).

Note, 45 *Harvard Law Review* 548 (1932).

Report of Federal Trade Commission on Price Bases Inquiry—The Basing-Point Formula and Cement Prices (1932).

Report of Federal Trade Commission on Competitive Conditions in the Cement Industry (1933).

Report of the Federal Trade Commission on Practices of the Steel Industry Under the Code (1934).

Federal Trade Commission, Report to the President with Respect to the Basing-Point System in the Iron and Steel Industry (1934).

Federal Trade Commission, Report to the President on Prices of Sheet Steel Piling (1936).

BURNS, *The Decline of Competition* (1936).

Hearings before the Committee on Interstate Commerce, the U. S. Senate on S. O. 4055 (1936).

Gustav Seidler, *Control of Geographic Price Relationship Under Conditions of Fair Competition*, N. R. A. Division of Review, Trade Practice Studies Section, Work Materials #86, March 1936.

## Appendix C

### Extracts from Volume 80 of the Congressional Record Dealing with the Elimination of the Anti-Basing Provision of the Robinson-Patman Bill.

#### HOUSE OF REPRESENTATIVES

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MR. SABATH. \* \* \* It is true that there are objectionable features, namely, the antibasing point and the classification provisions. But I want to inform the House that the Judiciary Committee has agreed to move to eliminate both of these provisions from the bill. Likewise, if it is shown that other features are objectionable, they may be modified.

\* \* \* \* \*

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MR. MILLER. \* \* \* Probably that provision should not have been put in a bill amending the Clayton Act; but it was put in and the committee has decided to offer an amendment to take it out.

\* \* \* \* \*

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MR. CRAWFORD. I want to touch now on one other thing, and that is with respect to the basing-point provision. A lot of people do not understand the basing-point provision and it is easy to understand why they do not. Lots of products are sold f. o. b. a given point. We will take, for instance, sugar. Sugar is sold f. o. b. New York City. The price today of cane sugar is \$5 a hundred f. o. b. New York City, and the price of beet sugar is \$4.80 f. o. b. New York City. The processor of sugar beets will receive an offer, we will say, at Saginaw or Bay City, Mich., to sell sugar at Bay City at the New York basis of, say, \$4.80. The sugar is invoiced to the Bay City wholesale jobber at \$4.80 per hundred pounds, plus the freight rate from New York to Bay City, and the Bay City jobber picks up the sugar at the Bay City processor's warehouse. If the sugar is sold to a customer at Cleveland, the price is \$4.80 plus the freight from New York to

Cleveland, and the Bay City processor pays the freight from Bay City to Cleveland. The freight charges from New York to Bay City are much greater than to Cleveland. Also the freight charges from the Bay City processor's plant to the jobber's warehouse in Cleveland is very high, all resulting in a much higher net for sugar sold and delivered at Bay City than if sold and delivered by the Bay City processor at Cleveland.

MR. FLETCHER. Will this bill remedy that sugar situation?

MR. CRAWFORD. Only in part. It is hoped to remedy the secret rebate I have mentioned. The basing-point provisions are to be eliminated from the bill, I understand.

We are going to strike out of this bill the basing-point provision, and if I had the time I could show you where, if that goes out, it may cost the American sugar growers of this country millions of dollars annually, and I know the figures that I am talking about. However, you cannot keep it in this bill and pass the bill, can you, Mr. Chairman?

MR. MILLER. That is the impression I have.

MR. CRAWFORD. That is right.

MR. MILLER. I agree myself that the basing-point practice that has grown up is indefensible, but I do not believe that can be taken care of in this bill.

MR. CRAWFORD. Neither do I, and I am not going to object to throwing that out of the bill, because we can crawl a little bit at a time and go as far as we can with this bill.

MR. BROWN of Michigan. I want to congratulate the committee for eliminating this provision from the bill at the request of many of us. If the section had remained in, it would be ruinous to small-town industry located some distance from the market.

MR. CITRON. Mr. Chairman, will the gentleman yield?

MR. MILLER. I yield.



Page 8323  
(cont.)

**MR. CITRON.** Mr. Chairman, if this provision remains in the bill, it would result in forcing f. o. b. shipping prices on manufacturers; but with this provision eliminated they will not be forced to charge f. o. b. shipping point prices. Otherwise, many would not be able to compete with foreign manufacturers, for instance, from Canada, who would not be subject to this provision if it remained in the bill.

As a member of the Judiciary Committee I voted to eliminate this paragraph, no. 5. I advocated the elimination of this paragraph in the committee, because I considered it would result in a hardship to the manufacturing industry of this country and of my own State.

. . . . .

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The paragraph in this bill that we are eliminating is as follows:

(5) That the word "price" as used in section 2 shall be construed to mean the amount received by the vendor after deducting freight or other transportation, if any, allowed or defrayed by the vendor.

#### REASONS AGAINST LIMITING MANUFACTURERS TO F. O. B. SHIPPING POINT PRICE IN AMENDING OUR ANTITRUST LAWS

I believe that there are very important reasons why this paragraph should be eliminated entirely, not only for the reason that there is already under consideration a bill which has separately and wholly to do with the basing-point price method, and on which committee hearings have been held, but also for the reason that the basing-point price method has some economically sound merits, and to prohibit the legitimate carrying on of this pricing system by industries will have serious consequences in many industries doing business within the confines of the United States. There is still a further most important reason why this particular definition of price should be eliminated from the instant bill, which is that it would compel all manufacturers and wholesalers under the jurisdiction

224 of the United States Government to ship all their merchandise on an f. o. b. point of origin basis and the consequences of such a statute would be to place many of our manufacturers and wholesalers at a serious disadvantage when competing with foreign manufacturers and exporters who do business in the United States.

But a more serious consequence of the inclusion of this definition of price, as previously stated, would be to compel all manufacturers to ship f. o. b. shipping point, and therefore compel the very definite localization of operations of all manufacturers and wholesalers, which would have the immediate effect of increasing costs as the result of seriously limited volume production.

#### VOLUME PRODUCTION

Volume production is the very lifeblood of many types of industries. If the products they manufacture cannot be made in large volume, upon which the low cost is dependent, the cost of the finished product would be so high that it would seriously curtail, if not entirely prohibit, their consumption.

This paragraph would seriously affect the publishers of national magazines, because it may mean that the national publishers cannot sell their magazines not only for the reason that the freight charges on the magazines to distant points will be so great as to prohibit the sale of the magazines at those points, but also for the reason that the magazines are dependent upon advertising revenues derived from national distributors whose operations will be seriously curtailed by this definition of price.

If this paragraph remains in this bill, it will mean the increased centralization of manufacturing in the more thickly populated industrial centers.

Some people say these consequences can easily be offset by manufacturers and wholesalers establishing wholesale-distributing points all over the United States. However, this would mean increasing the number of operations

and the amount of handling, all of which entails increased cost which the consumer must pay, and only the larger manufacturers in the country could finance the cost, and it would mean the further submergence of the small industry and the small-business man, which would actually tend to enhance monopoly in all branches of industry.

### I ADVOCATE PROTECTION FOR CONNECTICUT INDUSTRY AGAINST ANY UNFAIR FOREIGN COMPETITION

Another very serious objection to this paragraph is that in many instances our manufacturers and wholesalers would be placed at a serious disadvantage in meeting competition of manufacturers in other countries. Take an instance from my own State—the Scovill Manufacturing Co., a large and old established concern which manufactures thousands of different kinds of metal products, from articles for personal use—such as buttons—to parts to be used in the manufacture of other merchandise. Under the terms of this definition of price in the instant bill, they would be compelled to charge freight from Connecticut to New York City, to Baltimore, to New Orleans, to San Francisco, to Detroit, or to Chicago, just to mention a few major manufacturing centers. A manufacturer in the same kind of business, located in Canada or in Europe, or any other industrial country, and who is not subject to the jurisdiction of our Federal statutes, would be able to deliver his products f. o. b. to every one of these industrial cities which I have mentioned for the reason that they are all direct ports of entry into the United States. By the wording of this definition of price in this paragraph, the Scovill Manufacturing Co. could not meet the foreign competition, nor could any other manufacturer in the United States, under like conditions, meet that competition. The only way open to them would be to set up manufacturing branches in Canada, which would have the effect of further increasing unemployment in the United States.

Because of the reasons that I have given, I also favor the exclusion of this paragraph.







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FEB 27 1945

CHARLES LEONARD DROPLEY  
CLERK

IN THE  
Supreme Court of the United States

OCTOBER TERM 1944

No. 680

CORN PRODUCTS REFINING COMPANY, a corporation, and CORN PRODUCTS SALES COMPANY, a corporation,

*Petitioners,*

*vs.*

FEDERAL TRADE COMMISSION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**REPLY BRIEF FOR PETITIONERS**

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**REPLY BRIEF FOR PETITIONERS**

**Statement**

For the most part, petitioners' main brief provides their answers to the statements and arguments contained in the brief for the Federal Trade Commission. There are, however, certain features of the Commission's brief which invite further short reply.



## **As to Basing Point Delivered Prices**

### **Factual Matters**

At pages 7, 8, 23 and elsewhere in the brief for the Commission, reference is made, as was done by the Commission in its report, to "phantom freight" or a "fictitious freight charge". However, such coined phrases do not prove facts and are often more likely to confuse or mislead than to clarify. The terms "phantom freight" or "fictitious freight charge" might dramatize the Commission's argument if petitioners purported to sell transportation or quoted f. o. b. factory prices and separate charges for transportation and delivery. However, such is not this case. Petitioners make no representation to their buyers that they are being charged a certain amount or portion of the total price for transportation as such. The prices which petitioners quote are single factor, delivered prices.

In discussing these prices and the effect of using Chicago as a basing point, the Commission's brief (p. 8) compares the resulting delivered prices at different destinations only with the delivered price at Chicago. This, however, gives a false impression of the factual situation and of the competitive aspect of the case. It was stipulated that the candy manufacturers at the various destinations listed are "competitively engaged in the sale of" candy (p. 198). This means, if it means anything, that each is in competition with one or more of the others. But it does not mean that all those at points other than Chicago are in competition only, or necessarily at all, with manufacturers in Chicago. Thus a candy manufacturer at St. Joseph, Mo., may be in competition with those in Kansas City. If there is a manufacturer at Lincoln, Neb., he may be in competition with a manufacturer at Sioux City, Iowa, etc. And quite possibly there is much keener competition between two candy manufacturers located near each other in their common nearby markets than there is between either of them and manufacturers

far away in Chicago. Especially may this be so in "selling such candies at only a small fraction of a cent per pound lower than a competitor" (R. 198) where differences in costs of ingredients must be of little importance compared with "proximity to markets and delivery of the finished candies" (R. 199). Therefore, in determining both whether differences in delivered prices resulting from adding freight rates from Chicago to a Chicago base price produce discrimination, i. e., are the source of injury to some and advantage to others, and also whether such delivered prices adversely affect the competitive ability of any of the candy manufacturers, it is necessary to view the matter as a whole and consider how each would fare, not only in relation to manufacturers at Chicago as illustrated at pages 7 and 8 of the Commission's brief, but also in comparison with manufacturers at other points, if, as the Commission's order would require, delivered prices reflecting freight rates from Kansas City were substituted for the prices now paid.

This can be readily illustrated by a few examples, using the figures on page 7 of the Commission's brief.

Lincoln, Neb., and Kansas City, Mo., may well be in keener competition with each other in their common markets than either of them is with Chicago. Under the Chicago plus basis, the Lincoln manufacturer pays only 5 cents more for corn syrup than does his supposed Kansas City competitors. If Kansas City freight rates were employed, his price disadvantage as compared with Kansas City in buying corn syrup would be increased to 13 cents. The manufacturer at St. Joseph, Mo., would suffer even more from the Commission's order in comparison with his nearby competitors at Kansas City. They now pay the same delivered prices for corn syrup. Under the Commission's order the Kansas City manufacturers would have a price advantage of 9 cents. There is nothing in the record to show that from the standpoint of competition such differences between the candy manufacturers at St. Joseph and Lincoln and their supposed competitor at Kansas City would not

be far more serious, considering their natural markets, than the differences between the prices now paid by both of them and the prices paid by Chicago candy manufacturers.

Again, Sioux City, Iowa, now has a price advantage of 5 cents under Lincoln, Neb. If the freight rates from Kansas City were made the standard, the Sioux City manufacturer would pay 11 cents more for his corn syrup than his hypothetical Lincoln competitor.

A candy manufacturer at Fort Smith, Ark., now pays 4 cents less than one at Hutchinson, Kansas. Under the Commission's order, he would pay 9 cents more than his supposed Hutchinson competitor.

Can it be said that the candy manufacturers at St. Joseph, Mo., Lincoln, Neb., Sioux City, Iowa, or Fort Smith, Ark., are the victims of discrimination under the present method of determining the delivered prices which they pay, i. e., that these prices injure them and prefer their competitors, as compared with the prices they would pay if the freight rates from Kansas City were used? Again, considering these examples, how can it be found on this record that the present prices impair the ability of any manufacturer to compete with his real competitor as compared with what his competitive situation would be under the Commission's order?

It must be remembered, moreover, that even as between candy manufacturers at other points and those at Chicago, price discrimination is alleged, not because the prices paid by the former are higher than the prices charged to Chicago manufacturers, but because they are higher by the amounts of the freight rates from Chicago rather than those from Kansas City. As between a candy manufacturer at Denver and one at Chicago, therefore, the question is not, as might be inferred from the Commission's brief, whether a price difference of 66 cents\* in and of itself constitutes discrimination, but whether such a price difference is discriminatory when a difference of 56 cents would not be.

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\* The freight rate from Chicago to Denver is 66 cents, that from Kansas City to Denver is 56 cents (R. 197).

Furthermore, it must be realized that the table on page 77 of the Commission's brief does not tell the whole story as to freight rates. While to the Southwest and West the railroad freight rates from Kansas City are lower than from Chicago, nevertheless in going in other directions geography must inevitably reverse the picture. Hence, although the Commission here has seen fit to select points where the use of freight rates from Chicago has produced higher delivered prices than would have resulted from arriving at delivered prices by adding the freight rates from Kansas City to the same base price, nevertheless in other directions, where the freight rates from Chicago are less than those from Kansas City, the situation would necessarily be reversed.

These considerations emphasize how unwarranted it is to find price discrimination as a fact on the basis of no more facts than are stated in the stipulation here (R. 195-200), with no proof and no stipulation as to the facts concerning any particular candy manufacturers, no evidence where their principal markets are, no proof as to those with whom they compete or seek to compete in those markets, and no evidence as to what the real effects of their present delivered prices are upon the competition between them and their important competitors in their major markets and upon their businesses as a whole, in comparison with what that competition would be under delivered prices based upon Kansas City. In the light of these considerations, there is no basis for statements such as that on page 18 of the Commission's brief that

"it is obvious that their area of competition is region-wide \* \* \* and that their competition is effectively injured or prevented if arbitrary and important price discriminations are consistently conferred upon their competitors."

On pages 23 and 24 there are similar statements of unsupported assumptions regarding competition and the effect of petitioners' pricing method thereon.

Again, on page 40 counsel for the Commission remark that

"the record in this case discloses a trend toward centralization on the part of petitioners' customers, some of whom moved to Chicago where they were able to take advantage of petitioners' price system."

We submit that there is neither a scintilla of proof nor a stipulation of such "a trend toward centralization". Even the Commission did not go so far as to find such a "trend".

In this same vein, as though it were an indication of the consequence or effect of petitioners' pricing method, despite the complete absence of proof of any causal connection, page 45 of the Commission's brief refers to a finding "that some candy manufacturers formerly located elsewhere than Chicago have subsequently moved to that city." This finding is only a half statement of the facts in the record. For the stipulation upon which the finding is based states that

"some of such candy manufacturers were located at the cities listed in paragraph 3 before the construction and operation of respondents' [petitioners] Kansas City plant and some candy manufacturers formerly located at such cities have since 1922 relocated in Chicago." (R. 199)

This language requires the inference that some manufacturers likewise located at cities away from Chicago after petitioners' Kansas City plant went into operation, and it does not dispel the inference that some formerly located in Chicago have since moved elsewhere.

Moreover, this reference in the Commission's brief to what happened before and after the opening of the Kansas City plant emphasizes one factual aspect of the case which counsel for the respondent have failed to mention, presumably because it is unanswerable from their standpoint. This is the fact that all of the alleged consequences are really the result of the opening of the Kansas City plant and not of the pricing method. For if the Kansas City



plant had never been opened, the consequences would have been the same, whatever they were, under the pricing method contended for by the Commission as under that actually employed. And even now the entire basis for the allegation of violations of Section 2(a) would vanish if that plant should presently be closed. Having more than one plant cannot be discrimination in price within the prohibition of Section 2(a).

We submit that the manner in which counsel for the Commission have apparently felt compelled to embroider upon the record in order to provide the appearance of a factual foundation for their argument demonstrates how far short the record is of containing any substantial evidence to support a finding that petitioners' pricing practice results in discrimination against any particular candy manufacturer and in favor of any other within the intended prohibition of Section 2(a)\* and emphasizes the arbitrary character of the Commission's decision in finding such discrimination.

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\* Mr. Utterback, for the House managers of the Conference Committee, in explaining the meaning and purpose of the bill, described the discrimination intended to be prohibited in the following language (80 Cong. Rec. 9416):

"In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill."

## Comments on the Commission's Argument

*A. Whether differences in delivered prices at different destinations resulting from the basing point method constitute price discrimination within the meaning and prohibition of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.*

Very briefly the main points of petitioners' argument are: (1) that basing point prices have been so long and so generally in use that the differences therefrom should not now be found unlawful unless clearly prohibited by the statute here involved; (2) that the language of the statute does not constitute a prohibition of such price differences; (3) that before the Robinson-Patman Act, Section 2 was not interpreted as making such price differences unlawful; (4) that there is nothing in the language of the Robinson-Patman Act to indicate an intention to change the law in this regard; and (5) that on the contrary the legislative history and Congressional debates indicate affirmatively an intention not to embrace price differences resulting from the basing point system within the prohibition of price discrimination.

It is submitted that the Commission's brief does not overcome the force of these arguments.

### (1) THE LANGUAGE OF THE ACT

On page 17 of their brief, counsel for the Commission refer to petitioners' brief as making "the sweeping argument that the statutory provision applies only to purchasers within the same community." Of course, that overstates or oversimplifies petitioners' position. The point sought to be made was that it is easy to see that differences in the prices charged to two buyers in the same town might constitute discrimination, but that the Act appeared to lay down no standard as to the differences which were prohibited or permitted between prices at different destinations and it was therefore necessary to look to the Congressional history of the measure to discover what Con-

gress intended. The only alternative would be to assume that any price difference at all would constitute discrimination, which would mean that the Act required uniform prices throughout the country. It is not contended by the Commission that this is the effect of Section 2(a). On the contrary, it appears to be assumed by the Commission (Brief, p. 34) that the nationwide uniform delivered prices are definitely lawful although they inevitably involve far greater disregard of differences in actual freight cost than can be claimed here.

The Commission (p. 21) seeks to find a standard of permitted and prohibited differences in prices which will support its position, in the language of Section 2(a) permitting

“differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.”

But this is not a standard which specifies the permitted “differentials” between prices at different destinations where the “methods or quantities in which such commodities are \* \* \* sold or delivered” are the same. Such is the case here where we are concerned with sales and deliveries in tank car quantities shipped by railroad in tank cars.

In the last analysis, the Commission's contention that under Section 2(a) the differences in prices at different destinations must exactly reflect the differences in the freight rates actually paid\* is equivalent to saying that

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\* This entire case has gone on the assumption that the freight rates actually paid on every shipment are the local rates from Chicago or Kansas City, whichever is the shipping point. In fact, as explained in the footnote, on page 61 of petitioners' main brief, this may not always be the case since grain and its products move to a large extent under so-called “transit”. Hence, compliance with the Commission's views would not necessarily result in accurately reflecting the true freight on each shipment. However, the proceeding has not been complicated by injecting this feature.

goods must always be sold f. o. b. shipping point. Had Congress so intended it could have written such a requirement in clear and simple language, such as that of the provision at one time included in the bill as sub-paragraph 5 and then stricken out. The fact that no such language was left in the bill when it was passed argues convincingly against the Commission's claim that differences in prices produced by a uniform application of the basing point system constitute price discrimination intended to be prohibited by Section 2(a).

(2) THE INTERPRETATION OF SECTION 2 BEFORE THE  
ROBINSON-PATMAN AMENDMENT

In reply to our argument that the administration and enforcement of Section 2 of the Clayton Act prior to the passage of the Robinson-Patman Act demonstrate that basing point prices were not prohibited thereby, counsel for the Commission (p. 28) in one breath argue that old Section 2 was a "dead letter" and in the next that it did prohibit basing point prices but that it was not enforced as so doing "principally because of judicial misconstruction". According to counsel for the Commission, this judicial misconstruction was set right by the decision of this Court in *Van Camp & Sons Company v. American Can Company*, 278 U. S. 245. Since this decision was handed down in 1929 and no attempt to enforce the Act as prohibiting basing point delivered prices was made during the remaining eight years before the enactment of the Robinson-Patman Act, it must be assumed that the old act as correctly construed was deemed not to prohibit such prices.

Counsel for the Commission labor valiantly (pp. 25-27) to have it appear that "the Commission's greatest case", the *Pittsburgh Case*, 8 F. T. C. 1, affords an indication that old Section 2 of the Clayton Act was construed as prohibiting basing point prices. However, the Commission took no action to enforce its order in that case. An effort is made

to explain away this failure on the ground that no action was necessary because there was "a complete capitulation on the part of the defendants" (p. 27). However, even Professor Fetter, an avowed opponent of basing point prices, in "*The Masquerade of Monopoly*" (1931) refers to the Steel Corporation's answer as "half evasive and contemptuous, promising to comply with the decision so far as this was practicable (whatever that may mean)." This seems far different from "a complete capitulation". The fact is that basing point prices have continued in the steel industry and until the present case and the *Staley* case, in which the Commission has attacked basing point prices as unlawful only since the effective date of the Robinson-Patman amendment, no order of the Commission designed to prohibit basing point prices has been brought to the courts. It is a fair inference that no court action was taken to enforce the order in the *Pittsburgh Plus Case* because it was considered that Section 2 in its old form did not prohibit basing point prices.

That the Commission itself did not regard differences in delivered prices at different destinations resulting from the basing point method as coming within the prohibition of old Section 2 is indicated not only by its non-action but by the fact that since the decision in the *Pittsburgh Plus Case* the Commission has recommended on various occasions, as pointed out on page 37 of our main brief, the enactment of legislation to outlaw the basing point system. The Commission argues on page 28 of its brief that the various reports mentioned therein were intended to deal only with violations of the Sherman Act, but there is nothing in those reports to indicate that this is so. For example, the report to the Senate on Practices of the Steel Industry Under the Code, Senate Document 159 (73d Cong. 2d Sess. 1934) specifically states on page 1 thereof that the respondent would cover the question as to whether Section 2 of the Clayton Act was being violated by the persons and corporations adopting the Steel Code. Similarly, its "Report to the President with Respect to the Basing Point



System in the Iron and Steel Industry" in 1934, likewise discusses the *Pittsburgh Plus Case* and is not limited to a consideration of the basing point system solely in the light of the Sherman Act. Therefore the Commission's recommendation that the Code be amended to eliminate executive sanction of the basing point system, and to allow the Department of Justice or the respondent "to go forward in formal proceeding to test the basing point system" under the Sherman Act or the Federal Trade Commission Act, is highly significant in view of the lack of mention of the Clayton Act. In addition to the reports referred to in our main brief, it is noteworthy that in *Goodyear Tire & Rubber Co. v. Federal Trade Commission*, 101 F. (2d) 620 (C.C. A. 6th, 1939), cited at page 22 of the Commission's brief, the Court quotes (p. 623) from the Commission's annual report for the year ending June 30, 1935, where it urged the enactment of a law "to clearly define the discrimination in price intended to be forbidden".

### (3) THE HISTORY AND INTERPRETATION OF THE ROBINSON-PATMAN AMENDMENT

The Robinson-Patman Act was passed the next year after the Commission's report just referred to, and following debates and discussions in which its intended meaning and effect were more than usually set forth. Much more could be quoted from the Congressional discussion and the reports than we have reproduced in our main brief but it would all show beyond any possible doubt (a) that differences in prices at different destinations resulting from the basing point method were not regarded by Congress as already prohibited by Section 2 as it previously was; (b) that for this reason, because some members of the House Committee (for example, Utterback and Crawford) favored outlawing basing point prices, paragraph (5) was written into

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\* 80 Cong. Rec. pp. 6346-6351, 6425-6436, 7759-7761, 8102-8140, 8223-8242, 9413-9422, 9902-9904.

the original bill; \* (c) that because of opposition to any outlawing of basing point prices, paragraph (5) was eliminated; and (d) that the bill gained passage in both Houses of Congress on the representation of its sponsors that it did not prohibit basing point prices.

In the light of the outspoken statements of Congressional intent, we gladly adopt the language of the Commission's own brief (p. 23) that

"There is no ground for contending that the language and expressed purpose of Congress should be denied effect \* \* \*."

At pages 33 to 36 of their brief, counsel for the Commission endeavor to minimize the force of the rejection by Congress of paragraph (5) of the Patman Bill, which would have prohibited basing point prices, as a conclusive indication that Congress did not intend by the Robinson-Patman amendment to prohibit price differences resulting from the basing point method.

To this end the Commission's brief seeks other reasons than that given by the members of Congress themselves why paragraph (5) should have been eliminated. It is suggested first (pp. 34-35), that had paragraph (5) remained in the bill, it would have "required the use of the f. o. b. system of pricing" and the inference obviously intended is that the clause was eliminated because it was not the purpose of Congress to enforce "a compulsory f. o. b. price system". On this latter point we are in agreement with counsel for the Commission, but the suggestion would seem to support petitioners' position here rather than that of the Commission. This is so because a requirement that prices shall reflect actual freight is, in practical effect, a requirement that sales be made f. o. b. shipping point. Hence, if, as the Commission suggests, Congress intended no such require-

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\* This was the paragraph defining prices as

"The amount received \* \* \* after deducting actual freight or the cost of other transportation."

ment, Section 2(a) should not be interpreted as supporting the Commission's order here in issue, whose enforcement would have the same practical effect as though paragraph (5) had remained in the law.

On page 36 the further suggestion is made that the elimination of paragraph (5) was necessary because otherwise the provision entitling a producer to show that his prices were made in good faith to meet the "equally low price of a competitor" would "have been rendered nugatory". We fail to follow this reasoning. Paragraph (5) was a definition of "price", and it would appear that the provision as to meeting competition would still afford a defense to alleged discrimination in price.

However, there is no basis for seeking such hypothetical explanations for the elimination of paragraph (5) when the statements in Congress explain definitely why it was stricken from the bill. The reason was simple and direct. Congress did not want or intend by the Robinson-Patman amendment to make it unlawful to sell at delivered prices produced by the basing point method.

It is only with Section 2(a) as inserted in the Clayton Act by the Robinson-Patman amendment that this case is concerned. Therefore, whether basing point prices may be regarded as economically sound or unsound or whether under certain circumstances the maintenance of basing point prices may violate some other statute are matters which are beside the point. Congressman Miller, Chairman of the House committee in charge of the Robinson-Patman bill, summed up the matter when he said that he did not approve of the basing point practice but submitted the proposal for the elimination of paragraph (5) at the request of the Committee on the Judiciary with the idea that the Congress should deal with the basing point practice in a separate bill (80 Cong. Rec. 8224).

The fact that none of the separate bills, referred to at pages 43 and 44 of petitioners' main brief, designed to prohibit basing point prices, ever reached enactment is an indication that despite Congressman Miller's individual views it has not been the purpose of Congress to make bas-

ing point prices unlawful. The view that basing point prices in and of themselves had not been prohibited by the Clayton Act, as amended by the Robinson-Patman Act but were unlawful only when the result of a combination or conspiracy in restraint of trade, was reflected in the final report and recommendations of the Temporary National Economic Committee (Senate Document 35, 77th Cong. 1st Session, p. 33), which recommended the enactment of legislation to prohibit the basing point system in order to avoid the "costly process" of eliminating the system "under existing law" (obviously referring to the anti-trust laws). The report of this committee echoed the advice given to it by the Assistant Chief Counsel of the Commission, Mr. Walter B. Wooden, who testified before the committee on January 30, 1940 as follows (Verbatim Record of Proceedings of T. N. E. C. Vol. 11, p. 400):

"In closing, I would merely like to say that it seems to me the peculiar province of this Committee is to consider whether legislation outlawing the basing point system should not be recommended. As the situation is now with the outcome of any basing point case depending upon the interpretation of the law and the facts under *theories of conspiracy and concerted action which are necessary to make the law applicable*, I think, it requires an enormous expenditure of time and effort and labor in establishing in an adversary proceeding each particular industry and that the facts are in that industry regarding the basing point system." (Italics ours.)

B. *Whether there was substantial evidence to support a finding that petitioners' pricing practice has the effect upon competition essential to a violation of Section 2(a).*

On page 42, the Commission's brief refers to petitioners as contending "that the Commission's findings (directly based upon stipulated facts) are insufficient to support its conclusion" with regard to the effect of price differences on the competitive situation, and on the next page of the brief it is argued that to accede to this con-

tention would be "to draw an inference from the undisputed facts contrary to that drawn by the Commission and sustained by the court below". It is argued that this would contravene the rule laid down in *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 53, 63, that "the weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the Commission".

We certainly do not want the Court to approach this phase of the matter with the impression that petitioners contend simply that the Commission's findings are not sufficient to support its conclusions and take no exception to the findings themselves. Petitioners very definitely contend that even such findings as the the Commission has made on this question are *not* "directly based upon stipulated facts" and we submit that the inferences which the Commission has drawn are not "the inferences reasonably to be drawn from them."

Again, on page 46, the Commission's brief inadvertently misstates petitioners' position when it refers to "the undisputed findings in the instant case". Petitioners do dispute the findings as not only insufficient to sustain the conclusion but as unsupported by the evidence.

The Commission's brief makes no reply to the petitioners' argument that the Commission, having nothing in the record as to the consequences of the pricing practices except a stipulation of ultimate facts, was bound by that stipulation according to its own terms and that it was improper for the Commission to indulge in inferences therefrom, not stated in the stipulation itself.

The situation here is that the parties entered into a stipulation as to the utmost inferences which they would agree could be drawn from testimony of witnesses if hearings were held and witnesses examined. This case should be decided on the basis of this stipulation as the only findings. However, the Commission proceeded to embroider upon the stipulation. Then the court below drew inferences from the Commission's inferences and counsel for



the Commission in their brief suggest still further inferences from the comments of the lower court. We submit that in determining whether a violation of Section 2(a) has been established it is necessary to go back to the stipulation as embodying all of the findings which could be made with regard to the competitive angle of the matter. And the statements in that stipulation do not constitute findings that the petitioners' pricing practice has the effects upon competition essential to a violation of Section 2(a).

*C. The absence of finding or proof of knowledge by any purchasers.*

Turning to petitioners' argument that no violation of Section 2(a) can be found since there is neither a finding by the Commission nor any proof to support a finding that any purchaser who received the benefit of the alleged price discrimination did so "*knowingly*", the Commission's brief (p. 49) suggests that the word "*knowingly*" was inserted in the statute through error. The fact is, however, that the word is there. Certainly it was deliberately inserted, for its inclusion was made the subject of special mention in the committee's report.

The House managers of the bill in their report No. 2951, 74th Congress, 2d Session, pages 5-6, stated, with reference to the insertion of the word "*knowingly*":

"Its purpose is to exempt from the meaning of the sur-rounding clause those who incidentally receive discriminatory prices in the routine course of business without special solicitation, negotiation, or other arrangement for them on the part of the buyer or seller, and who are therefore not justly chargeable with knowledge that they are receiving the benefit of such discrimination."

Certainly on the record here the candy manufacturers purchasing from petitioners come within the intended exemption as so described.

To overcome the lack of proof of knowledge, the Commission's brief repeats (p. 48) the lower court's argument or assumption that petitioners' pricing system is "well known to the public". However, where knowledge is made an essential part of a prohibited act, it is something that cannot be assumed or taken for granted. *Gates v. Jones National Bank*, 206 U. S. 158 (1906). In that case this Court said (p. 180) that it was clearly established

"that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional."

Moreover, on the stipulated facts, no purchaser, even if familiar with petitioners' pricing methods, can thereby be said to have knowledge whether or not he is the recipient of the benefits of alleged discrimination because he cannot know the factory from which shipment will be made, either to him or to a competitor (R. 195-196). This is emphasized by the fact that under the customary terms, purchasers have thirty days after orders are placed in which to call for delivery (R. 40, 205). The Commission's brief attempts to meet this point (p. 49) by arguing that the Commission found that actual sales occur not when orders are placed but when delivery is made. However, it is when the orders are placed that the price is fixed and it is the buyer's knowledge then which counts.

*D. The Commission's failure to give effect to the situation resulting from the fact that petitioners have two plants, one at the basing point.*

It is difficult to believe that it was the intention of Congress in enacting the Robinson-Patman Act to require a concern having two plants, one at the basing point and the other at a different location, to charge different prices for the same product to two customers at the same destination dependent upon the manufacturer's election as to the plant from which delivery is made. It may well be that this was

one of the reasons which led Congress to strike from the Patman bill sub-paragraph (5) which would have had this result, and which caused the members of Congress in charge of the bill, in order to secure its passage, to give assurance that it would not affect the basing point method of determining delivered prices. Counsel for the Commission attempt to meet this argument at page 23 of their brief by asserting (a) that the statute would permit such discriminations; (b) that the customers would demand delivery from the nearest plant of petitioners; and (c) that such differentials would not have the adverse effect on competition specified by the statute.

The Commission, for the purposes of this present case, is, of course, forced to take position (a), but we wonder whether the Commission would adhere to that position, if the situation should arise elsewhere; (c) is an assumption only and appears incorrect, while (b) is contrary to the facts, as stipulated for the purposes of this case, that

"whether such sales have been and are fulfilled by shipment from respondents' plants at Chicago, Illinois, or by shipments from their plant at Kansas City, Missouri, has depended and depends in each instance upon the conditions at these respective plants, and has been and is entirely within the judgment and control of respondents." (R. 195-196)

## II

### **As to delayed bookings and deliveries and sales to tank wagon buyers.**

Little reply is needed to the Commission's argument on these features of the case.

On pages 50 and 51, the Commission's brief attempts to answer petitioners' contention that the extensions of time for placing orders or for taking deliveries were matters of terms of sale and not of price and therefore did not come within the prohibition of price discrimination.

It is significant that the Robinson-Patman Act as originally drawn contained language expressly prohibiting discrimination in terms of sale as well as in price, and that the reference to terms of sale was stricken before the enactment of the bill (H. Rep. No. 2951 74th Cong. 2d Sess. p. 5). The Commission, page 51, quotes the Conference Committee report as indicating an intention "that the bill should be inapplicable to terms of sale except as they amount in effect to indirect discriminations in price within the meaning of the remainder of sub-section (a)". In one sense, all differences in terms of sale directly or indirectly accomplish differences in price. However, the expression "terms of sale" must have been deemed by Congress to have some more definite meaning and therefore effect must be given to its elimination. It is difficult to imagine what would be considered a term of sale if the period of time within which delivery is to be made is not to be so regarded.

One of the points stressed by petitioners in their assignments of error and main brief has been that, with regard to these alleged violations, there is no proof whatever as to the effect of the claimed discrimination upon competition. The subject of these particular alleged violations was entirely a matter of oral proof and no evidence was presented by the Commission with respect to the effect of the alleged discriminations upon competition. The Commission in its report attempted to make good this lack of proof by treating the stipulation entered into concerning basing point prices as applicable to these alleged incidents. We have argued that this was highly improper and unjustified.

At pages 53 and 54 of the Commission's brief, it is asserted in defense of its action that "The facts and law relevant to this question are precisely the same as those already discussed . . . with reference to the competitive effect of the price discriminations growing out of petitioners' basing point system of selling and need not be repeated here".

Certainly as to the facts this statement that they are "precisely the same" is without support in the record and incorrect. The questions regarding delayed deliveries and bookings concerned only buyers in the Chicago area. The stipulation regarding basing point prices had to do with prices charged to buyers due to the very circumstance of their locations in different cities away from Chicago.

Counsel for the Commission at page 54 argue that the stipulation was not confined to the basing point issue. Nevertheless, there can be no doubt among the counsel who actually participated in the trial and in the negotiations leading to this stipulation that it was intended to be so confined. It is true that at the opening of the stipulation it was stated that "if hearings were held and witnesses were called at such hearings to testify with reference to the matters alleged in Count I of the complaint as amended and respondents' answer thereto, such witnesses would testify", etc. However, the suggestion now made by counsel for the Commission that paragraph 6 of the stipulation (R. 198, 199), which is the portion of the stipulation relating to effects on competition, was intended to cover *all* matters alleged in Count I is disposed of by the fact that separate stipulations were entered into with regard to discounts and allowances to buyers of starch and feeds (R. 186-191, 191-194), dealt with at pages 55 to 58 of the Commission's brief, although the allegations concerning these transactions were likewise included in Count I of the amended complaint (R. 11). Moreover, by its own terms the stipulation would be violated if it were deemed to relate to deferred bookings and deliveries and to sales to tank wagon buyers, since it was expressly stated as part of the stipulation that no further evidence on the charge of discrimination in price covered by the stipulation would be presented to the Commission by either party (R. 199), whereas most of the evidence relating to these matters was offered by the Commission thereafter (R. 201-290). Finally, a fair reading of paragraph 6 of the stipulation, which



is the paragraph dealing with the effect on competition, plainly indicates that it was concerned only with the effect on competition of differences in prices resulting from the basing point method and had no relation to differences in prices charged for other reasons to buyers in the Chicago area (R. 198-199). Thus the stipulation refers to the "higher prices paid for such syrup by such candy manufacturers located in the cities enumerated other than Chicago, Illinois" and the reference to "higher prices" is necessarily to the prices listed in paragraph 3 (R. 196), which are the prices described in paragraph 4 as determined "by adding to the prices shown for Chicago . . . the then effective local freight rate from Chicago to destination." This was certainly not, and was not intended to be, a stipulation as the effect of delayed deliveries or sales in tank car quantities upon the competitive ability of buyers in the Chicago area. And there was no testimony as to such effect, if any.

On page 54, the Commission's brief refers further to the sales to tank wagon customers. It is sufficient to remark that the brief attributes to these transactions a relation to the case not given to it by the Commission in its decision, nor by the lower court.

### III

#### **As to discounts or allowances.**

With regard to these transactions the Commission's brief on page 58 states "petitioners challenged none of the Commission's findings".

Most certainly the petitioners challenged the Commission's findings that there were violations of Section 2(a) in connection with these transactions. Petitioners' challenges of the Commission's findings and conclusions with regard to these transactions will be found at pages 504, 505 of the Record.

Moreover, counsel for the Commission (p. 58) describe petitioners as urging "that these allowances and discounts

have not been demonstrated by the Commission to have had a *substantial* effect on competition." This is an understatement. We submit that the stipulations afford no basis for a finding that the discounts and allowances have had *any* effect on competition between purchasers from petitioners and that on the authority of cases cited at pages 49 and 50 of petitioners' main brief, facts as to the effect on competition necessary to show a violation of the Act cannot be assumed without proof.

#### IV

**As to the advertising arrangement with Curtiss Candy Company which is alleged to constitute a violation of Section 2(e) of the Clayton Act, as amended.**

Petitioners submit that regardless of other features of the Curtiss transaction which are discussed in their main brief, it does not come within the terms of Section 2(e) in that the dextrose purchased by Curtiss is not a "commodity bought for resale, with \* \* \* processing." We have argued that if language has meaning, the sale of candy in which dextrose is only one ingredient among others is not the resale of processed dextrose.

To meet this argument, the Commission's brief, at page 65, first cites cases in which the word "process" is used as a noun in a broad generic sense in connection with the patent laws. It does not follow, however, that "processing" and "process" have the same meanings. On page 66 the brief cites *Colgate-Palmolive-Peet Co. v. United States*, 320 U. S. 422; *Loose-Wiles Biscuit Co. v. Rasquin*, 95 F. (2d) 438, certiorari denied, 305 U. S. 611; *Tasty Baking Co. v. United States*, 38 F. Supp. 844, certiorari denied, 314 U. S. 654; *Cincinnati Soap Co. v. United States*, 22 F. Supp. 141; as authorities concerning the mean-

ing of the word "processing". In connection with these cases, the brief states:

"Likewise never challenged by the taxpayer or the courts, and specifically acquiesced in by the Congress, is the application of a tax on the 'processing' of coconut oil into shortening powder or soap. \* \* \*

"Not once has the suggestion been raised that the type of chemical alteration involved in these cases is not validly described as a processing."

As a matter of fact, the question in those cases did not turn on the meaning of the word "processing" as such, but rather on the construction of the term "*first domestic processing*", that is whether it meant the first "processing" after the goods were brought into this country or the first "processing" after the enactment of the taxing statute.

Moreover, the statute which imposed the tax contained the following provision (48 Stat. 763, § 602½):

"For the purpose of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate."

The fact that in enacting this tax Congress found it necessary expressly to define the term "processing" as including, for the purposes of the statute, the use of a commodity in the *manufacture or production* of an article intended for sale would certainly seem to support the conclusion that in enacting Section 2(e) of the Clayton Act, where no such broad and sweeping definition was used, Congress did not intend to cover the situation where a commodity is "sold for use \* \* \* in the manufacture or production of a different article intended for sale".

Perhaps confusion has been caused by emphasis upon the meaning of the word "processing" rather than upon the word "*resale*". After all, resale is the important word

and a transaction does not come within Section 2(e) unless it involves a commodity bought *for resale*. The prefix "re" in that word necessarily means that the same commodity which is sold in the original transaction must be the commodity which is involved in the resale. The sale of candy is not a resale of dextrose within any reasonable use of the English language. None of the cases cited in the Commission's brief go to this point.

With regard to the balance of the discussion of the Curtiss transaction in the Commission's brief, petitioners' arguments are set forth in its main brief except for pointing out that in considerable part the Commission's argument on this feature of the case rests, not upon the language of the statute, but upon the Commission's idea of what is required by public policy. Needless to say, it is the action of Congress which is determinative and not the views of the Commission.

### CONCLUSION

**The arguments in the brief for the Commission should not prevail.**

Respectfully submitted,

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February 26, 1945.









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(1)



# **In the Supreme Court of the United States**

OCTOBER TERM, 1944

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No. 680

**CORN PRODUCTS REFINING COMPANY AND CORN  
PRODUCTS SALES COMPANY, PETITIONERS**

**v.**

**FEDERAL TRADE COMMISSION**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT**

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**MEMORANDUM FOR THE FEDERAL TRADE COMMISSION**

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## **OPINION BELOW**

The opinion of the Circuit Court of Appeals (R. 527) is reported in 144 F. (2d) 211.

## **JURISDICTION**

The decree of the Circuit Court of Appeals was entered on September 18, 1944 (R. 596). The petition for writ of certiorari was filed on November 15, 1944. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.



## QUESTIONS PRESENTED

For reasons subsequently stated (*infra*, pp. 8-9), the Government does not oppose the granting of certiorari to review the questions presented by petitioners relating to the validity of paragraphs (1) and (2) of the Federal Trade Commission's order as modified by the court below (R. 597). Paragraph (1) of such order prohibits the petitioners from discriminating in price between different purchasers by selling glucose shipped from their Kansas City plant at delivered prices computed on petitioners' prices at their Chicago plant plus freight rate from Chicago to destination. Paragraph (2) prohibits discriminating in price between different purchasers of glucose by permitting favored customers, following a price increase, to book orders or to obtain delivery at petitioners' prior lower price for longer periods than allowed to petitioners' other customers.

The Government opposes the granting of certiorari to review the questions presented relating to the validity of paragraphs (3), (4), and (5) of the Commission's order (R. 489-490). These questions are:

(1) Whether the evidence and findings are sufficient to show that the effect of price discriminations given by petitioners to certain purchasers of gluten feed and meal and to certain purchasers of starch may be substantially to lessen competition or to injure, destroy or prevent competition.

within the meaning of Section 2 (a) of the Clayton Act.

(2) Whether petitioners, in advertising candy of the Curtiss Candy Company of which dextrose purchased from petitioners constituted from 5% to 90% of the product, discriminated in favor of the purchaser of a commodity bought for resale after "processing", within the meaning of Section 2 (e) of the Clayton Act.

(3) Whether the evidence supports the Commission's determination that petitioners did not offer advertising service on proportionally equal terms to other candy manufacturers purchasing dextrose from petitioners.

#### STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

(a) \* \* \* it shall be unlawful for any person engaged in commerce \* \* \* either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, \* \* \* where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing

herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: \* \* \*

\* \* \* \* \*

(e) \* \* \* it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

#### STATEMENT

The Federal Trade Commission brought this proceeding pursuant to Section 11 of the Clayton Act charging petitioners, a manufacturing concern and its wholly-owned marketing subsidiary, with violating Section 2 of that Act as amended by the Robinson-Patman Act of June 19, 1936.<sup>1</sup> The

<sup>1</sup> The Commission also charged petitioners with violating Section 3 of the Clayton Act (R. 13-14), but petitioners have not sought review of the decision below affirming that part of the Commission's order prohibiting the violation of Section 3 found by the Commission. See paragraph eleven of the Commission's findings and paragraph (6) of its order (R. 485-7, 490).

facts were largely stipulated (R. 186-200) but evidence was received on certain issues. Following the hearing the Commission filed its findings of fact and conclusion (R. 464-488) and entered a cease and desist order (R. 488-490). The court below, on a petition to review the order, affirmed it except for its prohibition of price differentials based upon the differing sizes of containers used by petitioners in making delivery (R. 527-541).<sup>2</sup> Judge Major dissented from the holding that petitioner's delivered prices on glucose shipped from their Kansas City plant violate Section 2 (a) of the Clayton Act, but otherwise concurred in the decision (R. 541-2).

Since the Government does not oppose the petition for certiorari in so far as it requests review of the validity of the provisions of the Commission's order directed against the price discriminations resulting from (1) petitioners' delivered prices on glucose shipped from their Kansas City plant and (2) petitioners' booking practices, the facts relating to these practices will not be set forth.

The facts concerning the price discriminations given by petitioners to certain purchasers of gluten meal and feed and to certain purchasers

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<sup>2</sup> These price differentials are set forth in paragraph five of the Commission's findings and are prohibited by paragraph (1) of its order (R. 470-1, 489). The Court below modified paragraph (1) of the order to eliminate this prohibition (R. 597).

of starch were stipulated (R. 186-193) and the Commission's findings (R. 474-481) closely follow the stipulated facts. As to the former products the Commission found:

Petitioners sell gluten meal and feed, which are a by-product of their corn refining, to some 3,000 customers, and petitioners' output represents from 40% to 50% of the entire amount used in the United States. Petitioners have given to six concerns a discount of 50¢ a ton from the regular market prices which they have charged to other customers, including those located in the respective areas in which the six favored concerns resell gluten feed and meal. Petitioners offered no evidence to show that the discounts made only due allowance for differences in cost to petitioners resulting from the differing methods or quantities, if any, in which such products were sold to the favored companies. The discounts are sufficient, "if and when reflected in whole or in substantial part in resale prices," to attract business away from competitors of the favored concerns, or to "force" these competitors to resell at a substantially reduced profit, "or to refrain from reselling." (R. 474-480.)

The Commission found that petitioners sold corn starch to two companies at a "substantial discount" from the list prices at which petitioners concurrently sold to competitors of these companies. The findings as to the competitive effect of the dis-



counts are substantially the same as those made with reference to gluten feed and meal. It was likewise found that no evidence has been offered that the discounts made only due allowance for differences in cost resulting from differing methods or quantities involved in the sales made to the two favored companies. (R. 480-1.)

The facts relating to the Curtiss Candy Company were developed by testimony and exhibits. This company spends as much for advertising as all other candy companies in the United States combined. In 1936 it agreed with petitioners to use dextrose, which is a dry, powdered product derived from glucose, for the manufacture of most of its candies and to advertise the use of dextrose in its candies. The Curtiss Company used the dextrose purchased from petitioners in making candy by mixing it with such other ingredients as milk, butter, eggs, chocolate, and peanuts, but dextrose constituted a substantial, and frequently a major, portion of the candies sold by the Curtiss Company. Petitioners, for their part, began advertising Curtiss candies as being rich in dextrose, and during the years 1936 to 1939, inclusive, spent approximately \$750,000 in advertising Curtiss candies. During this period the Curtiss Company's purchases of dextrose from petitioners increased from about 1,350,000 pounds in 1936 to over 7,000,000 pounds in 1939, and the company, which had not purchased any glucose from peti-

tioners in 1936 and 1937, bought from them in 1938 over 10%, and in 1939 nearly 60%, of its glucose requirements. Petitioners during the time that they were advertising Curtiss candy sold dextrose to candy manufacturers competitive with the Curtiss Company but did not furnish advertising service to any of these competitors and since June 19, 1936, petitioners have instructed their salesmen to advise their confectionery customers that petitioners do not contribute to the advertising done by customers. (R. 481-5.)

#### ARGUMENT

##### I

The Government believes that the court below was correct in holding that Section 2 (a) of the Clayton Act prohibits price discriminations resulting from selling a product at delivered prices computed on a fictitious basing point. But since the application of the statute to price discriminations of this kind presents a question of federal law of general importance which has not been passed upon by this Court and since this question will be in issue in *Federal Trade Commission v. Staley Manufacturing Company*, No. 559 this Term, certiorari granted November 20, 1944, the Government does not oppose review of the questions presented in the petition (pp. 18-19) relating to this issue.

The Government also does not oppose review of the questions raised by the petition as to the

validity of paragraph (2) of the Commission's order, which prohibits price discriminations granted in connection with petitioners' booking practices. The court below in sustaining this part of the Commission's order held that general testimony that these price discriminations were granted because competitors were giving like discriminations, without any testimony as to specific instances and facts, was insufficient to establish that petitioners' discriminatory prices were made in good faith to meet the equally low price of a competitor, within the proviso of Section 2 (b) of the Clayton Act (R. 534). This holding presents a question closely analogous to one which this Court has consented to review in the *Staley* case, namely, whether acceptance by a seller, without inquiry into the facts, of verbal statements of buyers concerning the action of competitors establishes justification within the proviso of Section 2 (b).

## II

As to the price discriminations which resulted from the discounts granted by petitioners to certain purchasers of gluten feed and meal and of starch, the question presented by the petition (see pp. 13, 22) is whether the evidence and findings support the conclusion that the effect of the discriminations "may be substantially to lessen competition \* \* \* or to injure, destroy, or prevent competition." We submit that such effect

is clearly shown by the evidence and findings (*supra*, p. 6) that the discounts, if and when reflected in the favored customers' resale prices, are sufficient to attract business away from their competitors or to force these competitors to resell at a substantially reduced profit or to refrain from reselling. The court below said that the natural result of these facts "is even more than 'reasonably probable' to produce the prohibited injurious effect upon competition" (R. 535).

The Commission found that petitioners, at the same time that they were giving certain customers a discount, were selling in "substantial quantities" at their regular market prices to their many other customers in the area in which each favored customer resold (R. 476-9, 480). This establishes that the competition between the favored and non-favored customers was substantial, and the cases which petitioners cite (Br. 32-33) for the proposition that "competition cannot be substantially lessened unless substantial competition exists" are therefore not in point. The cases are further not in point because the prohibitions of Section 2 (a), unlike those of Sections 3 and 7, apply not only where the effect may be substantially to lessen competition but also where the effect may be "to injure, destroy, or prevent competition".

We submit that the question whether the court below correctly appraised the particular evidence and findings does not present a question of stat-

itory interpretation of general application and therefore does not merit review by this Court.

### III

Section 2 (e) of the Clayton Act makes it unlawful to furnish to the purchaser of a commodity bought for resale, "with or without processing," any services connected with resale of the commodity not accorded to all purchasers on proportionally equal terms. Petitioners contend that a commodity is not within this prohibition if it is bought for resale after processing operations which destroy its separate identity and that the advertising services which it furnished the Curtiss Candy Company are therefore not within Section 2 (e). No reason for giving the section this limited meaning is suggested and no supporting authority is referred to.

The court below concluded that Congress used the words "with or without processing" as a comprehensive term to embrace all goods bought for resale whether in their original form or after processing operations (R. 538). This interpretation accords with both the language of the statute<sup>3</sup>

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<sup>3</sup> In *Cochrane v. Deener*, 94 U. S. 780, 788, this Court said that a "process" is "an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing." This definition has been applied to the word "processing" used in connection with manufacturing operations. *Bedford v. Colorado Fuel & Iron Corp.*, 102 Colo. 538, 541, 549.



and its manifest purpose. The distinction drawn is between goods bought for the purchaser's own use, such as plant equipment, and goods bought for resale whether with or without processing. This is a natural distinction to draw since Section 2 prohibits various kinds of preferences to purchasers which give or might give them an advantage in competition over other customers of the same seller. Such effect is likely to arise where a commodity is resold but not if it is retained by the purchaser for his own use. We submit that the decision below is plainly right and, in the absence of any contrary ruling, is not sufficiently doubtful to warrant review by this Court.

The other questions raised by the petition with reference to the advertising services furnished the Curtiss Candy Company do not seem to require serious consideration. The fact that the Curtiss Company did not expressly agree to purchase its dextrose from petitioners does not make it any the less a "purchaser" within the meaning of Section 2 (e). The contention that the requirement that services furnished to one purchaser be accorded to all purchasers "on proportionally equal terms" is to be read as if it meant "all purchasers whose volume of business substantially equals that of the favored purchaser" is simply a plea that the word "proportionally" be read out of the statute.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied except as to the questions presented respecting the validity of paragraphs (1) and (2) of the Commission's order.

✓ CHARLES FAHY,  
*Solicitor General.*

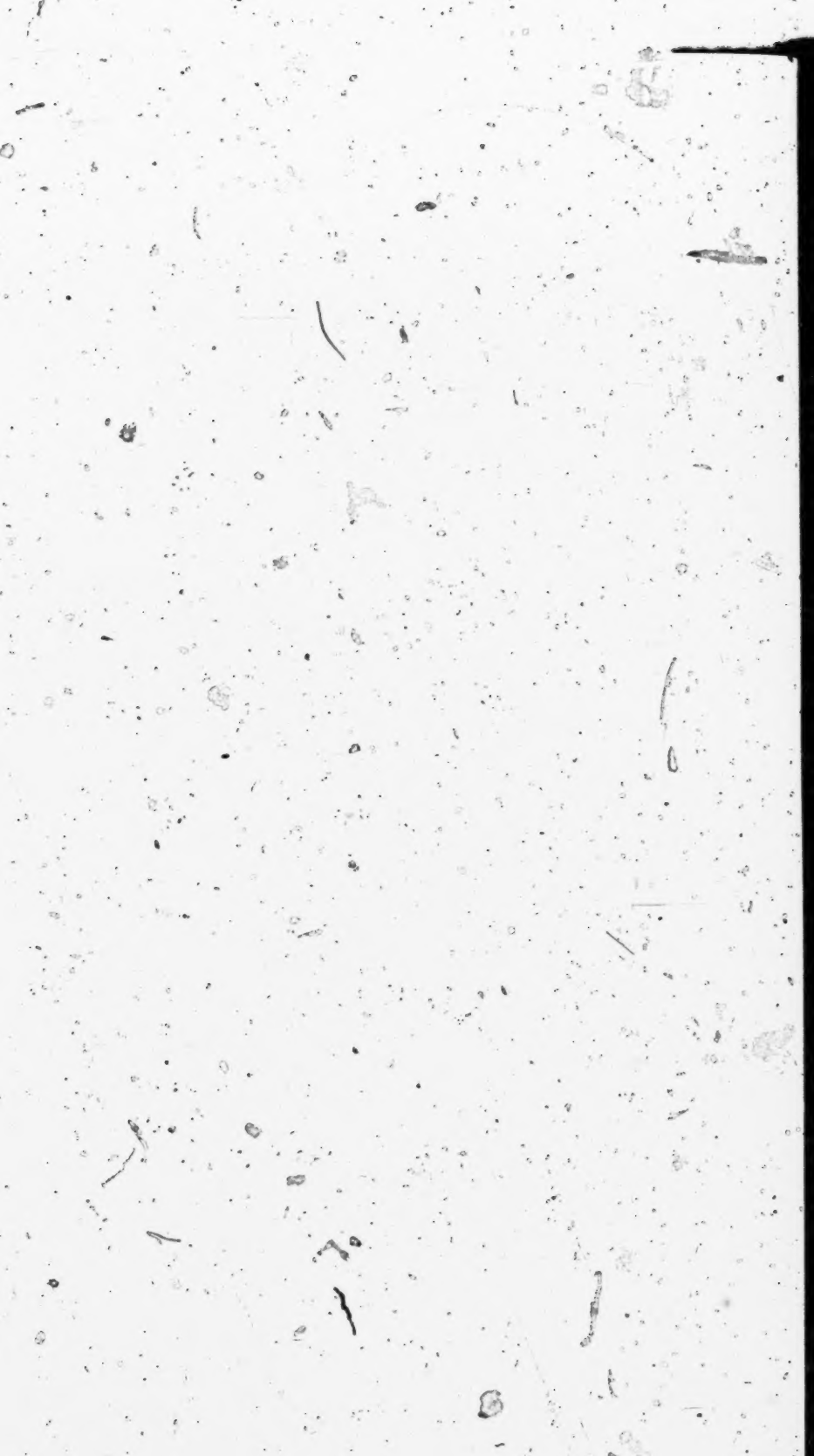
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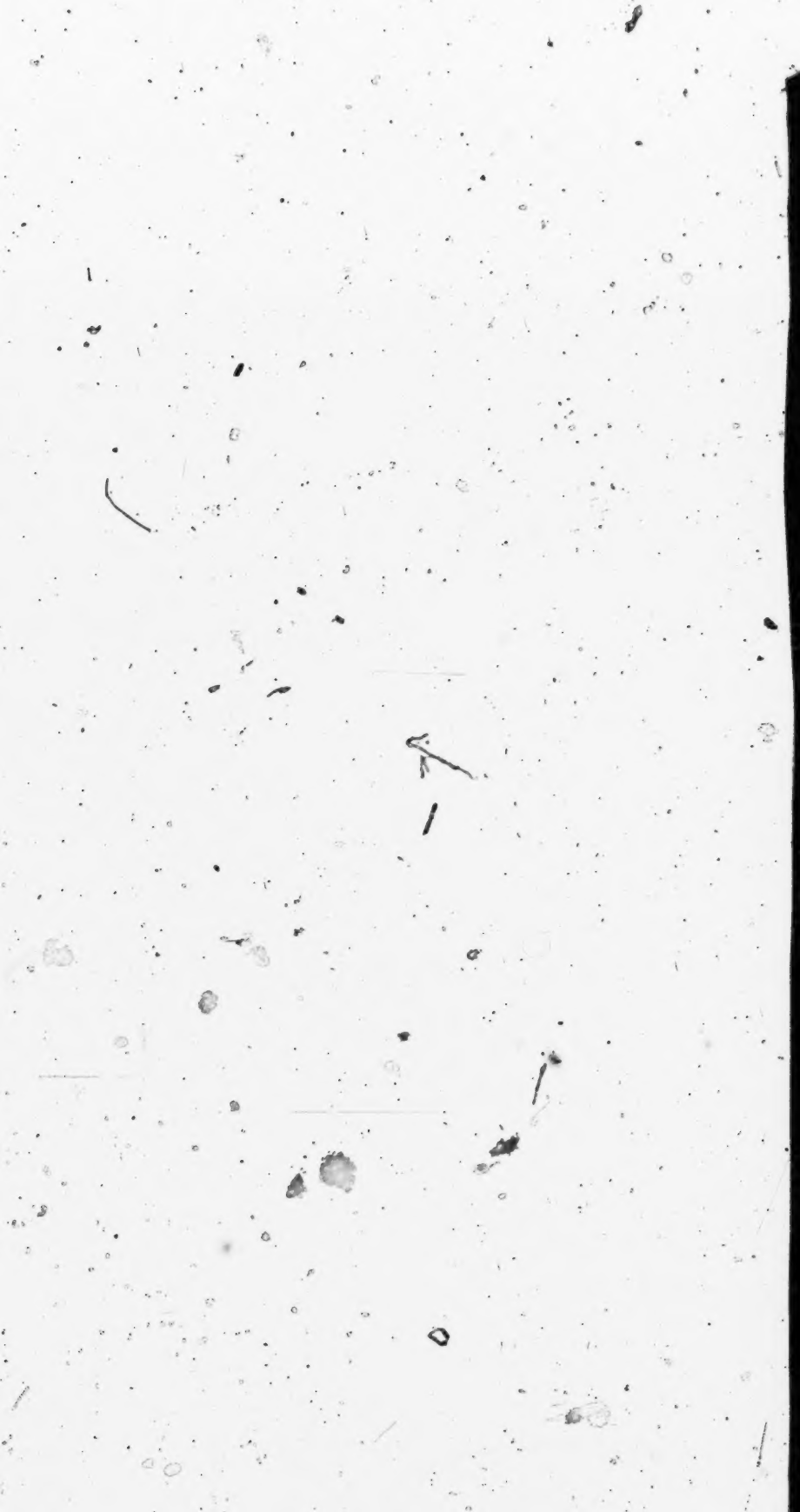
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DECEMBER 1944.









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# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 680

CORN PRODUCTS REFINING COMPANY AND CORN  
PRODUCTS SALES COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

BRIEF FOR THE FEDERAL TRADE COMMISSION

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## OPINION BELOW

The opinion of the Circuit Court of Appeals  
(R. 527) is reported in 144 F. (2d) 211.

## JURISDICTION

The decree of the Circuit Court of Appeals was entered on September 18, 1944 (R. 596). The petition for a writ of certiorari was filed on November 15, 1944 and was allowed on December 18, 1944. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 38 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

(1) (a). Whether petitioners' sales of glucose at delivered prices computed on a single basing point irrespective of actual place of shipment, and the consequent charging of higher prices to purchasers in certain cities than to purchasers in other cities by reason of the inclusion of a fictitious freight charge in such higher prices, constitutes a discrimination in price between different purchasers of the same commodity within the meaning of Section 2 (a) of the Clayton Act.

(b). Whether the evidence supports the Commission in finding that the effect of petitioners' price discriminations between different purchasers of glucose may be substantially to lessen competition among them or to injure, destroy, or prevent competition with customers who knowingly receive the benefit of discriminatory prices.

(2) (a). Whether petitioners in allowing certain favored customers, following a price advance, to book orders or to take delivery at the preceding lower price beyond the period allowed petitioners' other customers, discriminated in "price" between different purchasers of the same commodity in violation of Section 2 (a).

(b). Whether petitioners have sustained the burden of showing that the price discriminations referred to in the preceding question were made in good faith to meet the equally low price of a competitor within the meaning of Section 2 (b) of the Act.



3. Whether the evidence supports the Commission's determination that the effect of discounts which petitioners granted to certain favored purchasers of gluten feed and meal and of starch may be substantially to lessen competition among purchasers of these commodities or to injure, prevent, or destroy competition with the beneficiaries of petitioners' price discriminations.

4 (a). Whether petitioners in furnishing to Curtiss Candy Company as a purchaser of petitioners' dextrose important advertising services in connection with the sale of Curtiss candy, of which dextrose constituted from 5% to 90% of the product, discriminated in favor of the purchaser of a commodity bought for resale after "processing" within the meaning of Section 2 (e) of the Clayton Act.

(b). Whether the evidence supports the Commission's determination that the advertising services furnished by petitioners to Curtiss Candy Company were not accorded to all purchasers of their dextrose on proportionally equal terms.

#### STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

(a) \* \* \* it shall be unlawful for any person engaged in commerce \* \* \* either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality,

\* \* \* where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: \* \* \*

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

\* \* \* \* \*

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

#### STATEMENT

In this proceeding under Section 11 of the Clayton Act the Federal Trade Commission charged petitioners with discriminating in price between different purchasers of commodities of like grade and quality in violation of Section 2 (a) of that Act (R. 10-12). It also charged petitioners with discriminating in favor of two purchasers of dextrose against other purchasers thereof by furnishing services in connection with the sale of this commodity which were not accorded to all purchasers on proportionally equal terms, in violation of Section 2 (e) of the Act (R. 12-13).

The Commission also charged petitioners with violating Section 3 of the Clayton Act (R. 13-14), but petitioners have not sought review of the decision below affirming that part of the Commission's order directed against violation of Section 3. See paragraph eleven of the Commission's findings and paragraph (6) of its order (R. 485-7, 490).

The facts as to certain practices alleged to be in violation of Section 2 (a) were stipulated (R. 186-200) and evidence was introduced on the other practices charged as being in violation of that section or of Section 2 (e). At the close of the hearing the Commission filed its findings of fact<sup>2</sup> and conclusion (R. 464-488) and entered a cease and desist order directed against the violations of subsections (a) and (e) of Section 2 set forth in the findings (R. 488-490). The court below, on a petition to review this order, upheld its validity except for its prohibition of the practices described in paragraph five of the findings (R. 527-41), not now involved, and affirmed the order after modifying it to eliminate this prohibition (R. 489, 597).

The following findings of the Commission are pertinent to the issues now before this Court:

#### 'PETITIONERS' BASING POINT SYSTEM OF SELLING

Petitioners have two plants for the manufacture of glucose (also called corn syrup), one at Argo, Illinois, within the Chicago switching district and one at Kansas City, Missouri. The former plant has been operating since 1910 and the latter since 1922. All of petitioners' bulk sales of glucose have been made at delivered prices which have been computed, irrespective of whether the glucose was shipped from Chicago

<sup>2</sup>As to the practices covered by stipulation, the findings closely parallel the stipulated facts.

or Kansas City, at petitioners' Chicago price plus the freight rate from Chicago to place of delivery. Thus purchasers in all cities other than Chicago pay a higher price than do Chicago purchasers and, in cities having a lower freight rate from Kansas City than from Chicago, a part of the higher price represents "phantom" or fictitious freight (R. 467-470.)

The tabulation below shows the effect of petitioners' selling practices in twelve such cities on August 1, 1939, in cents per 100 pounds of glucose shipped in tank car lots (R. 468-469). Column (2), giving the freight rate from Chicago, shows the amount by which the price is higher than petitioners' Chicago price; column (4), giving the amount by which the freight rate from Kansas City is lower than that from Chicago, shows the phantom freight included in the higher price paid by purchasers in the cities named.

(1) City	(2) Freight Rate from Chicago	(3) Freight Rate from Kansas City	(4) Excess of Col. (2) over Col. (3)
Kansas City, Mo.	40	0	40
St. Joseph, Mo.	40	00	31
Springfield, Mo.	40	36	44
Pt. Smith, Ark.	65	45	20
Hutchinson, Kans.	61	36	25
Lincoln, Nebr.	45	13	32
Sioux City, Iowa	40	24	16
Waco, Tex.	85	63	22
Sherman, Tex.	77	54	23
Sac Antonio, Tex.	88	69	19
Denver, Colo.	66	56	10
Salt Lake City, Utah.	77	67	10

Petitioners have the right to determine from which plant they will make shipments in fulfillment of orders which they accept, but all shipments to purchasers in the cities listed above, except for a "few sales," are made from the Kansas City plant (R. 467-468).

Since petitioners' Chicago price for glucose in tank car lots was \$2.09 per hundred weight on August 1, 1939 (P. 468), its Kansas City customers were paying about 19% higher prices than its Chicago customers, its St. Joseph and Lincoln customers about 15% higher prices, and its Denver and Salt Lake City customers about 5% higher prices, on account of a fictitious freight charge.

Petitioners made no attempt to show that the higher prices paid by purchasers in cities having a lower freight rate from Kansas City than from Chicago made only due allowance for differences in the cost of delivery to purchasers in these cities (R. 470).

#### PRICE DISCRIMINATIONS GROWING OUT OF PETITIONERS' BOOKING PRACTICES

Petitioners have also discriminated in price in other ways. In the case of an advance in price, petitioners give notice thereof to the trade generally and call it to the attention of their customers by letter, telephone, or personal calls by salesmen. For a period of five days (formerly ten days) after the increase all customers are per-



mitted to "book" orders at the old price and orders so booked must be delivered within 30 days of the price advance. These bookings are not firm contracts of purchase, and an actual sale occurs only when delivery of the glucose is ordered. Petitioners have permitted certain favored customers engaged in making candy to book orders at the old price beyond the five-day period allowed their other customers and have also permitted certain favored customers to take delivery of orders booked at the earlier, lower price more than thirty days after the price advance. A variation of the latter practice has occurred when petitioners have allowed certain customers to book orders at the price for tank car deliveries and to take delivery in tank wagon quantities over extended periods of time, thus giving these favored customers a lower price than that paid by other tank wagon purchasers following the price advance. (R. 471-472.)

COMPETITIVE EFFECTS OF PRICE DISCRIMINATIONS BETWEEN DIFFERENT PURCHASES OF GLUCOSE

Glucose purchased from petitioners is one of the major raw materials used in making many varieties of candy, constituting from 5% to 90% of the finished weight. Glucose is generally used in greatest proportion in candies manufactured to sell at a few cents a pound on narrow margins of profit. As to such candies not differentiated by name or brand, customers may be diverted

from one manufacturer to another by a difference in price of a small fraction of a cent per pound, particularly in the case of candy sold to chain stores and others purchasing in large quantities. The payment by candy manufacturers of higher prices for glucose may diminish their ability to compete with those buying at lower prices. This result may be either "avoided or augmented" by other factors, such as labor, taxes, proximity to markets, etc. A number of candy manufacturers formerly located in cities other than Chicago have, since 1922, relocated in Chicago. (R. 473-474.)

**PRICE DISCRIMINATIONS TO PURCHASERS OF GLUTEN FEED AND MEAL AND TO PURCHASERS OF CORN STARCH**

Petitioners sell gluten meal and feed by-products of their corn refining to some 3,000 customers, and their output represents from 40% to 50% of the entire amount used in the United States. Petitioners have given to six concerns a discount of from 50¢ to 65¢ a ton from the regular market prices which they have charged to other customers, including those located in the respective areas in which the six favored concerns resell gluten feed and meal. (R. 474-479.)

Petitioners have also sold many millions of pounds of corn starch to two companies for use, consumption, and resale throughout the United States. These sales have been made at a "sub-

stantial" discount or allowance from the list price at which petitioners concurrently sold to other concerns competing with the favored companies in the use, consumption, and resale of corn starch. (R. 480.)

The discounts given by petitioners to six purchasers of gluten feed and meal and to two purchasers of corn starch are sufficient, if and when reflected in resale prices, to attract business away from competitors of these purchasers. Petitioners offered no evidence to show that these discounts made only due allowance for differences in cost resulting from selling the products to the favored companies in differing methods or quantities. (R. 479-480, 481.)

#### PREFERENTIAL ADVERTISING SERVICE FURNISHED TO CURTISS CANDY COMPANY

The Curtiss Candy Company spends about as much for advertising as all other candy companies in the United States combined. In 1936 it agreed with petitioners to use dextrose, which is a dry, powdered product derived from glucose, for the manufacture of most of its candies and to advertise the use of dextrose in its candies. The Curtiss Company used the dextrose purchased from petitioners in making candy by mixing it with such other ingredients as milk, butter, eggs, chocolate, and peanuts, but dextrose constituted a substantial, and frequently a major, portion of the candies sold by the Curtiss Company. Peti-

tioners, for their part, began advertising Curtiss candies as being rich in dextrose, and during the years 1936 to 1939, inclusive, spent approximately \$750,000 in advertising Curtiss candies. During this period the Curtiss Company's purchases of dextrose from petitioners increased from about 1,350,000 pounds in 1936 to over 7,000,000 pounds in 1939, and the company, which had not purchased any glucose from petitioners in 1936 and 1937, bought from them in 1938 over 10%, and in 1939 nearly 60% of its glucose requirements. Petitioners during the time that they were advertising Curtiss candy sold dextrose to candy manufacturers competitive with the Curtiss Company but did not furnish advertising service to any of these competitors, and since June 19, 1936, petitioners have instructed their salesmen to advise their confectionery customers that petitioners do not contribute to the advertising done by customers. (R. 481-5.)

#### SUMMARY OF ARGUMENT

1. Petitioners' system of prices, under which fictional freight is charged from Chicago on shipments from Kansas City, is plainly discriminatory against purchasers in cities situated nearer freightwise to Kansas City than to Chicago. Such discriminations in price are unlawful under Section 2 (a) of the Clayton Act as amended. The sweeping contention of petitioners that the statute does not apply to sales to purchasers in different

cities is refuted by the language of the statute and its purpose. The scope of Section 2 of the Clayton Act is not narrowed by virtue of the fact that Section 3 of the Robinson-Patman Act, which imposes criminal penalties, includes among the several practices prohibited by it one practice necessarily involving geographic price discrimination.

Where purchasers are located in different communities, price differentials bearing no relation to actual cost of freight cannot be justified. The statute permits price differences based on due allowance for differences in cost of delivery; it thus prohibits price differences having no such basis.

The statute creates no exception or immunity for discriminations which stem from a form of basing-point system of prices. No decision under the original Clayton Act lends support to any such implied exemption. On the contrary, the Commission in one of its most celebrated cases ordered steel corporations to cease and desist from employing the so-called Pittsburgh-plus system of delivered prices, and the corporations filed notice of compliance with the order. In amending Section 2 of the Clayton Act, the Robinson-Patman Act was designed to strengthen its provisions in a number of respects, and to weaken them in none. Petitioners' reliance on the rejection in the House of a proposed amendment which would have outlawed all forms of basing-point systems rests on a failure to appreciate the full

scope of the proposed amendment. That proposal, by defining "price" in terms of net price, after deducting actual cost of freight, would have precluded any system of uniform delivered prices and would have required the use of the f. o. b. price system. It would have rendered nugatory, so far as delivered prices are concerned, the proviso permitting discrimination in good faith to meet the equally low price of a competitor. In rejecting the proposal, Congress left the problem of basing-point prices to be determined on the facts of each case under the general language of Section 2 (a) rather than to be determined by a rule of thumb which would have gone much beyond the scope of the existing law.

The Commission properly found that petitioners' price discriminations in the sale of glucose affected competition within the meaning of Section 2 (a). The findings, based on a stipulation, disclose that the ability of manufacturers of cheap candy to compete among themselves is affected by differences of a fraction of a cent in selling price, that the fictitious freight charged on glucose by petitioners ranges from one-tenth to four-tenths of a cent per pound, and that glucose is the principal ingredient of cheap candy. Purchasers compelled to pay the arbitrary freight differential must reduce or lose their profit margin or else attempt to increase the selling price of their product. The present case satisfies the de-



cisions which have construed Sections 3 and 7 of the Clayton Act, dealing with tying agreements and stock acquisitions, as requiring that the effect must be one which would probably lessen competition. Those decisions, in any event, impose a more stringent requirement than is appropriate here. The Robinson-Patman Act amended Section 2 of the Clayton Act to provide that the prohibited effect of discriminations might be not merely substantial injury to competition in any line of commerce, but also injury to competition with any person who knowingly receives the benefit of such discrimination or with customers. The favorably located purchasers in the present case have knowingly received the benefit of discriminatory prices.

2. Petitioners' so-called booking practices, whereby certain favored customers may place orders or take deliveries at the old prices during a longer period after a price advance than is granted to other purchasers, are also discriminatory within Section 2 (a). If these are not direct discriminations in price, they are discriminations which amount in effect to indirect discriminations in price, and these are equally prohibited. Petitioners have not sustained the burden of establishing that the booking practices were entered into in good faith to meet the equally low price of competitors, within the proviso of Section 2 (b). The court below properly held that the Commis-

sion's determination was sound in view of the lack of particularity in the evidence offered by petitioners. The effect of the discriminatory booking practices on competition raises an issue substantially similar to that considered in connection with the basing-point practices.

3. Petitioners' discounts or allowances to various purchasers of gluten feed and meal, and of starch, constituted unlawful discriminations under Section 2 (a). Petitioners' sole objection relates to the question of effect on competition, and for the reasons given in connection with the basing-point practices, the conclusion of the Commission on this point was proper.

4. Petitioners' advertising arrangement with the Curtiss Candy Company concerning dextrose was in violation of Section 2 (e) of the Clayton Act as amended. The arrangement discriminated in favor of one purchaser against other purchasers of a commodity bought for resale with processing, under the terms of Section 2 (e). Curtiss Candy Company, which was a candy manufacturer and distributor, purchased dextrose from petitioners for resale with processing. The advertising allowances were furnished upon terms not accorded to all purchasers on proportionally equal terms, as required by Section 2 (e). The sales to Curtiss were sufficiently connected with interstate commerce to bring them within the scope of the section, whether there be

read into the section a requirement that the transactions be in the course of interstate commerce or that they substantially affect such commerce.

## ARGUMENT

### I

PETITIONERS' DELIVERED PRICES CONSTITUTE UNLAWFUL DISCRIMINATIONS WITHIN THE MEANING OF SECTION 2 (A) OF THE CLAYTON ACT AS AMENDED BY THE ROBINSON-PATMAN ACT

A. PETITIONERS' DELIVERED PRICES ARE DISCRIMINATORY WITHIN THE MEANING OF SECTION 2 (A)

It has been shown, *supra*, pp. 6-8, that petitioners' system of delivered prices, under which freight is charged from Chicago despite the fact that shipments are made from Kansas City, results in substantial discrimination against purchasers in cities which are nearer freight-wise to Kansas City than to Chicago. As was said succinctly by the court below (R. 529), "a fictional factor is included in the sales price which is warranted in no way by actual delivery cost or other element."

In contending that these arbitrary differences in delivered prices are not discriminations within the meaning of Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, petitioners make the sweeping argument that the statutory provision applies only to purchasers within the same community (Br., pp. 32-34).

There is nothing in the statutory language which would justify such a restrictive construction, and both the Senate and House committee reports indicate explicitly that the section is intended to cover purchasers located in different states. The Senate report states (S. Rep. 1502, 74th Cong., 2d sess., p. 4) that "Section 2 (a) attaches to competitive relations between a given seller and his several customers \* \* \*" and that there is specific language in Section 2 (a) "designed to extend its scope to discriminations between interstate and intrastate customers, as well as between those purely interstate." Referring to the discriminations covered by the section, the report declares:

When granted by a given seller to his customers in other States, and denied to those within the State, they involve the use of that interstate commerce to the burden and injury of the latter. When granted to those within the State and denied to those beyond, they involve conversely a directly resulting burden upon interstate commerce with the latter.

See to the same effect, H. Rep. 2287, 74th Cong., 2d sess., p! 8.

In the case of the candy manufacturers involved in this case, it is obvious that their area of competition is regionwide, if not nationwide, and that their competition is effectively injured or prevented if arbitrary and important price

discriminations are consistently conferred upon their competitors. To exclude this competitive situation is to deprive the Act of any effectiveness whatever in the protection of wholesalers or manufacturers unless two or more of them are fortuitously located in the same city—a wholly arbitrary criterion. “Where all the conditions of the relation require protection, protection ought to be given.” *Lehigh Valley Coal Co. v. Yensavage*, 218 Fed. 547, 552 (C. C. A. 2d); *N. L. R. B. v. Hearst Publications, Inc.*, 322 U. S. 111, 129.

Despite petitioners' argument (Br. p. 33), Section 3 of the Robinson-Patman Act does not narrow the scope of Section 2 (a) of the Clayton Act as amended. Section 3 provides criminal penalties where, among other things, goods are sold in any part of the United States “at prices lower than those exacted \* \* \* elsewhere in the United States for the purpose of destroying competition \* \* \*.” Thus provision is made

<sup>2</sup> Sec. 3 reads as follows:

SEC. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality,

for criminal penalties for certain of the practices over which the Federal Trade Commission is given jurisdiction under Section 2. Section 3 had an independent origin in the so-called Borah-Van Nuys bill in the Senate, where it was added to the Robinson-Patman Act. 80 Cong. Rec. 6346, 6351. The relationship of Section 3 to Section 2 (a) of the Clayton Act (amended by Section 1 of the bill) is sufficiently explained in the conference report (H. Rep. 2951, 74th Cong., 2d sess., p. 8):

\* \* \* It contains the operative and penal provisions of what was originally the Borah-Van Nuys bill (S. 4171). While they overlap in some respects, they are in no way inconsistent with the provisions of the Clayton Act amendment provided for in section 1. Section 3 authorizes nothing which that amendment prohibits, and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of the amendment provided in section 1, section 3 sets up special prohibitions as to the particular offenses therein described and attaches to

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and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.



them also the criminal penalties therein provided.\*

In the light of the criminal nature of Section 3, the limited application of this one clause in Section 3 to the specific practice of local price cutting (which is not singled out in Section 2), and the differing legislative genesis of the two sections, it is evident that the language of Section 3 of the Robinson-Patman Act cannot serve to restrict the interpretation of Section 2 of the Clayton Act as amended.

It is contended by petitioners that in any event the discriminations in price which are prohibited do not include discriminations resulting from the inclusion of arbitrary amounts on account of transportation. (Br. p. 34). Nothing in the statute supports the contention. Indeed, that discriminations so caused are prohibited is made clear by the proviso in Section 2 (a) permitting differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." Differences in delivered prices which are not a due allowance for differences in the cost of delivery cannot be justi-

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\* As a critic of Section 3 has put it, the clause of Section 3 quoted *supra*, p. 19, "merely prohibits local price cutting which was prohibited by the Clayton Act prior to the present law." Gordon, *Robinson-Patman Anti-Discrimination Act*, 22 Am. Bar. Assn. J. 593, 600 (1936).

fied. The Clayton Act had been more loosely drawn in this clause, since it broadly permitted discrimination "on account of" differences in grade or quantity of the commodity sold, and the Federal Trade Commission was not able to persuade the courts that grade and quantity differentials must be limited in the same way as those covered by the proviso that only such differentials be permitted as make "due allowance" for differences in the cost of selling or transportation. *Goodyear Tire & Rubber Co. v. Federal Trade Commission*, 92 F. (2d) 677, 678; 101 F. (2d) 620 (C. C. A. 6th), certiorari denied, 308 U. S. 557; cf. *National Biscuit Company v. Federal Trade Commission*, 299 Fed. 733 (C. C. A. 2d). The Robinson-Patman Act remedied this difficulty by extending the "due allowance" clause to grade and quantity differentials as well as selling and transportation differentials. The Senate report stated (p. 5) in explaining the phrase "which makes only due allowance":

This phrase is carried over from the present act, but as coupled with the remainder of the clause, is here extended to limit quantity differentials, as well as those on account of selling and transportation costs. It marks the zone within which differentials may be granted. (Italics supplied.)

Just as the Act would permit due allowance, but not arbitrary differences, based on difference in the cost of motor and railway transportation to

different purchasers, so it permits due allowance, but not arbitrary differences, based on differences in freight costs on account of varying distances.

There is no ground for contending that the language and expressed purpose of Congress should be denied effect because unreasonable or anomalous consequences would ensue. Making the assumption that phantom freight on shipments from Kansas City is abandoned, petitioners contend (Br. pp. 47, 59-62) that it may be necessary on occasion to ship to one buyer from the nearby mill in Kansas City and to another buyer in the same city from Chicago, and that to charge a higher delivered price to the second buyer would create discrimination or at least dissatisfaction. The statute permits different prices to be charged to buyers in the same city under these circumstances, for Congress has established its own criterion of discrimination, on the principle that it is not discriminatory to charge different prices where these prices reflect actual differences in cost of selling or transportation. Moreover, where the price to each customer depends on place of shipment, it seems clear that Kansas City customers and others similarly situated, instead of allowing petitioners to determine the place of shipment, would demand delivery from the nearby plant, and the situation suggested by petitioners would rarely arise. But if in the special circumstances suggested, petitioners on occasion did ship

from Chicago at the same delivered price as from Kansas City, and if the differential between prices at Chicago and at destination were deemed not to be within the limits of "due allowance" under the statute, still the adverse effects on competition would not be comparable to those resulting from the systematic discriminations here involved, and would doubtless not bring the prices within the condemnation of the statute.

Indeed, it is petitioners' construction of the statute which would produce anomalous results. If the meaning of the law were to be judged by a weighing of the desirability of the results produced, the uniform, systematic price discriminations against all purchasers in particular localities under the present system is far more objectionable than occasional, sporadic price differences between purchasers in the same locality. To permit sales to competing purchasers at widely different prices merely because the purchasers are situated in different localities, where the price differentials have no relation to costs of transportation, would open the door to easy evasion of the statute. Section 2 (a), it is to be noted, makes unlawful discriminations in price "either directly or indirectly." It is scarcely necessary, however, to rely on this provision against evasion, in view of the plain application of the basic statutory language to the price discriminations here involved.

B. NEITHER THE ACT NOR ITS LEGISLATIVE HISTORY SERVES TO EXCLUDE PETITIONERS' PRICE DISCRIMINATIONS FROM SECTION 2 (A) BECAUSE THEY RESULTED FROM THE USE OF A BASING-POINT SYSTEM.

It has been shown that petitioners' geographic price discriminations are within the scope of Section 2 (a) of the Clayton Act, if the language of that Section is to be given effect. Petitioners argue, however, that the legislative history of the Robinson-Patman Act discloses an intention not to render illegal what is described loosely as "the basing point system". In our view, the legislative history serves, on the contrary, to reinforce the conclusion that price discriminations of the kind practiced by petitioners are unlawful under Section 2 (a).

Before examining the legislative history in detail, it is pertinent to consider the applicability of Section 2 of the Clayton Act prior to its amendment, since the terms of the Robinson-Patman Act do not single out basing-point or other practices for specific treatment. Perhaps the outstanding case brought by the Commission under the original Section 2 was against the United States Steel Corporation and its subsidiaries to compel them to cease and desist from the sale of their rolled steel products on the "Pittsburgh plus" price system. After lengthy investigation and hearings, in which more than 20 states were represented in opposition to the Corporation's

price system, the Commission issued a cease and desist order. That order, significantly, was based not on the Sherman Act but on Section 2 of the Clayton Act and Section 5 of the Federal Trade Commission Act. 8 F. T. C. 1. As petitioners assert (Br., pp. 35-36), the proceeding did not soon reach the courts. But this was because the Corporation chose not to seek review and instead filed with the Commission a formal statement of intended compliance with the order, though without admitting its validity.<sup>5</sup> Of this proceeding, which attracted unusually widespread attention, it has been said that "this may well be

<sup>5</sup> The notice of compliance stated:

Pursuant to the order made by the Federal Trade Commission in the above entitled cause, dated July 21, 1924, the respondents, United States Steel Corporation, American Bridge Company, American Sheet and Tinplate Company, Carnegie Steel Company, National Tube Company, American Steel and Wire Company, Illinois Steel Company, Minnesota Steel Company, and Tennessee Coal, Iron and Railroad Company, report as follows:

1. Respondents, without admitting the validity of said order or the jurisdiction of the commission to make the same, have determined to conform thereto, and will hereafter conform thereto, in the sale of their various products, insofar as it is practicable to do so.

2. Respondents have abandoned the Pittsburgh Plus system, as defined in said order throughout their various organizations and will not hereafter make use of the same.

3. Respondents will not quote for sale or sell their rolled steel products upon any other basing point than



said to be the Commission's greatest case." Mechem, *The "Pittsburgh Plus" Case*, 10 A. B. A. J., 806, 811 (1924).

In the face of such a complete capitulation on the part of the defendants, there was obviously no immediate necessity for the Commission to take further action against them.<sup>6</sup> Approximately ten years later, in response to inquiries from the Congress and the Executive whether the functioning of the steel industry under the NRA Code of Fair Competition was violative of the antitrust laws and to what extent collusive bidding had taken place on the part of steel manufacturers

that where the products are manufactured or from which they are shipped.

4. Sales from manufacturing plants, fabricating plants, and warehouses will be made f. o. b. plant or warehouse, or at delivered prices, as occasion may offer. In all cases of sales at delivered prices the contract of sale or the invoice will clearly and distinctly indicate how much is charged for the steel products sold f. o. b. the producing or shipping point, and how much is charged for the actual transportation of such products, if any, from such producing or shipping point to destination.

5. All f. o. b. selling prices, whether at the mills, warehouses, or fabricating plants and all delivered prices will be non-discriminatory within the meaning of the second section of the Clayton Act, but will be subject to the variations permitted by said act.

<sup>6</sup> In 1938, however, after the enactment of the Wheeler-Lea amendment attaching penalties to violations of Commission orders (52 Stat. 111), the Corporation petitioned for review in the Third Circuit, and the Commission cross-petitioned for enforcement. The case is still pending.

applying for Government orders, the Federal Trade Commission submitted the reports referred to in petitioners' brief (pp. 37, 40): *Practices of the Steel Industry Under the Code*, Sen. Doc. No. 159, 73d Cong., 2d sess. (1934); *Report of the Federal Trade Commission to the President with Respect to the Basing Point System in the Iron and Steel Industry* (1934); *Report to the President on Steel Sheet Piling* (June 10, 1936). Because these requests for information were obviously to determine whether there was concerted action violative of the Sherman Act, the Commission's reports naturally were limited to that feature. It is completely unwarranted to infer, therefore, as petitioners do, that these reports represented in any way a retreat from the firm position which the Commission had taken in 1924 that the basing-point system used by the steel industry violated Section 2 of the Clayton Act.

While it is objected that there was no great number of cases attacking basing-point systems under Section 2, the explanation relates to Section 2 itself and not to the problem of basing points in particular. It is well known, and indeed was one of the dominant reasons for the enactment of the Robinson-Patman Act, that the original Section 2 was almost a dead letter, principally because of judicial misconstruction of the language and weaknesses in certain of its provisions, making enforcement unduly difficult. It had

been held, for example, that a showing of effect on competition as between customers of the defendant was insufficient, and that there must be shown an effect on competition between the defendant and its own rivals. *Mennen Company v. Federal Trade Commission*, 288 Fed. 774 (C. C. A. 2), certiorari denied, 262 U. S. 759; *National Biscuit Company v. Federal Trade Commission*, 299 Fed. 733 (C. C. A. 2). Not until the decision of this Court in 1929 in *Van Camp & Sons Company v. American Can Company*, 278 U. S. 245, were the foregoing decisions disapproved. Until the doctrine laid down in these decisions was overruled, it would have been extremely difficult to attack the application of a basing-point system where the major discriminatory effects of such a system were directed to customers, rather than to other manufacturers and shippers. The vagueness of the proviso permitting discriminations in good faith "to meet competition" was another deterrent to enforcement. The requirement that competition in a line of commerce, and not simply the competition of particular firms, must be affected, was still a further weakness. Cf., e. g., *Vivadeau Corp. v. Federal Trade Comm'n*, 54 F. (2d) 273 (C. C. A. 2). The Commission itself, in a report which was part of the background of the Robinson-Patman Act, stated in 1936: "It is apparent that section 7 has become a virtual nullity \* \* \*. As to enforcement of Section 2 of the Clayton Act the situation is not

much more favorable. \* \* \* The principal difficulties of enforcement grow out of the provisos regarding quantity, cost of selling, and meeting competition." *Final Report on the Chain Store Investigation*, Sen. Doc. No. 4, 74th Cong., 1st. sess., 89-90. The Commission also stressed the discouraging effect of the decisions in the *Mennen* and *National* cases, *supra*. *Id.*, at 90. See also *id.*, at 63-65.

It was to remedy these defects in Section 2 and thus to strengthen generally its provisions that the Robinson-Patman Act was adopted. See Sen. Rep. 1502, 74th Cong., 2d sess., p. 3; H. Rep. 2287, 74th Cong., 2d sess., p. 3; *Goodyear Tire & Rubber Co. v. Federal Trade Commission*, 101 F. (2d) 620, 623-4. In short, the dearth of cases under Section 2 reflects not at all on the question of its applicability to discriminations taking the form of basing-point practices where the requisite statutory elements are present.

Nor is there anything in this Court's opinions in *Maple Flooring Association v. United States*, 268 U. S. 563, and *Cement Manufacturers Association v. United States*, 268 U. S. 588, decided in 1925, to which petitioners have referred (Br., p. 31), which casts doubt on the subsection of basing-point prices such as are here involved to Section 2 of the Clayton Act. Those cases were brought under the Sherman Act and the central question was one of concerted action. Moreover, the comments which the Court made on the basing-

point system involved in the *Cement* case show clearly that it was regarded as a system markedly different from that in the present case. In upholding the distribution of freight rate books in the *Cement* case, the Court pointed out that the books were employed in carrying out a system of pricing under which the basing points "are points of actual shipment from which the larger proportion of the cement in a given locality in which cement is manufactured is actually shipped" (p. 597). Furthermore, as described by the Court, the system there employed was one in which producers compared the freight rates from their own mill and from a mill nearer the purchaser, in order to meet, where necessary, the latter's price. The Court said (pp. 598-599):

\* \* \* If there were no blanket freight rate the competing mills must still use the rate from a given basing point in order to compete with the mills located in the vicinity of that chief point of production. In either case the freight rate from the basing point is an essential element in making a delivered price, since selling by any particular manufacturer at the lowest of the delivered prices computed from several basing points is a necessary procedure in competing in the sale of cement. The freight-rate book, therefore, not only enables the manufacturer to calculate a delivered price on the basis of his own mill price, which he determines, to

points in the territory nearest in point of freight rate to his own mill, but it enables him also to determine at once the freight differential which he must offset in his mill price in order to compete with other manufacturers serving any other given territory.

What was there said thus has reference to the Sherman Act and to a system of multiple basing points under which the lowest freight rate to the purchaser is taken in order to meet competition.

With this background we turn to the legislative history of the Robinson-Patman Act insofar as it relates to basing-point prices. The situation is not one where courts had held or stated that basing-point prices were outside the scope of Section 2 of the Clayton Act, and where the amendatory legislation must consequently be viewed in terms of a purpose to override such judicial declarations. Compare *United States v. South-Eastern Underwriters Association*, 322 U. S. 533; *Helvering v. Griffiths*, 318 U. S. 371. As originally introduced, as passed by each House, and as finally enacted after conference, the measure contains nothing suggesting the exclusion from its scope of discriminations which may be traced to a basing-point system.

Transportation differentials were authoritatively declared to come within the scope of the Act. In presenting the Conference Report to the House, Congressman Utterback, Chairman of the House Conferees, explained the exemption



from the prohibitions of the Act of price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." Dealing specifically with the question of freight differentials, he said:

Where the methods of delivery are the same, but the distance is different, price differences in such cases may, of course, be made to reflect those differences. In such case the price is really paid both for the commodity itself and for its delivery, and the differing freight rates or commercial trucking rates applicable to the different delivery distances involved are, of course, differences in cost which may be reflected in differences (in such delivered price. (80 Cong. Rec. 9417 (1936).)

There would have been no point in laboring the fact that price differentials which reflected real differences in cost of freight were justified under the Act, unless it were true that differentials which did not reflect such differences in freight were not justified. See also pp. 22-23, *supra*.

In the face of this legislative background, petitioners rely on the rejection by the House of a proposed amendment which would have completely outlawed the basing-point system of delivered prices. In order to understand the significance

of this rejection, it is necessary to appreciate exactly what the proposed amendment would have accomplished. It was intended to be inserted as subsection (5) of Section 2, and was submitted by the House Judiciary Committee when it reported the bill. H. Rep. 2287, 74th Cong., 2d sess., p. 2. The proposal was drawn in terms of a definition of "price" and read as follows:

That the word "price" as used in this section 2, shall be construed to mean the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor.

As is obvious, that provision would not only have made any basing-point system unlawful, even where the delivered prices under a multiple basing-point system were employed to meet the low price of a competitor, but it would have outlawed the entire system of uniform delivered prices and required the use of the f. o. b. system of pricing. The report of the House Committee stated this explicitly (*id.* p. 14):

It would seem that the basing-point method of selling commodities clearly results in unlawful price discrimination, that it results in the lessening of competition, and that it tends to create a monopoly. In effect, this provision of the bill is designed to put an end to price discrimination through the medium of the basing-point or delivered-price system of selling commodities.

ties. It will require the use of the f. o. b. method of sale.

So absolute and drastic a measure did not fail to encounter opposition, and it was announced that the Committee itself agreed to withdraw the proposal. 80 Cong. Rec. 8102, 8140. While some members of the House felt that it should be included, it was voted down. 80 Cong. Rec. 8224. Opposition was voiced on behalf of farm organizations, one of which objected "to the provisions of subparagraph 5 which would eliminate the multiple basing point system of sales." *Id.*, 8118. See also *id.*, 8106, 8122. The most comprehensive statement in opposition to the proposal was made by Congressman Citron (quoted in part in *Vet. Br.* pp. 90-92), who pointed out that "This paragraph involves more than the so-called basing-point system." (80 Cong. Rec. 8224.) He stressed the argument that under the basing-point system manufacturers and wholesalers by establishing a more or less uniform delivered price, were enabled to meet competition outside of their own local freight areas and to attain wider national or regional markets. In addition to this defense of uniform delivered prices, he stressed the objection that under a compulsory f. o. b. price system, manufacturers would not be able to compete with foreign manufacturers selling at ports of entry in the United States. He said (*id.*, 8223): "\* \* \* It would result in forcing f. o. b. shipping prices on manufacturers; but

with this provision eliminated they will not be forced to charge f. o. b. shipping point prices. Otherwise, many would not be able to compete with foreign manufacturers, for instance, from Canada, who would not be subject to this provision if it remained in the bill."

Under the proposed definition of "price", far-reaching results would have been brought about. Uniform delivered prices would have been unlawful, and the proviso entitling a producer to show that his discriminatory "prices" were made in good faith to meet the "equally low price of a competitor"—a proviso contained in the House Bill as it had been reported by the Judiciary Committee (80 Cong. Rec. 8139)—would have been rendered nugatory so far as delivered prices are concerned. The House determined that the problems raised by such a measure should be given separate treatment. 80 Cong. Rec. 8224.

In the Senate there was no parallel discussion for no similar proposal was offered. In the course of the general debate on the bill, however, a similar concern was expressed lest the measure prohibit delivered prices. Senator Duffy asked whether the bill made delivered prices illegal so that Wisconsin manufacturers could not sell to distant markets. He read a telegram stating that the "bill prohibiting delivered prices will eliminate Wisconsin manufacturers from distant markets or necessitate factory operations out-

the state \* \* \*. 80 Cong. Rec. 6287. Senator Logan gave assurance that "there is nothing at all like that in the Robinson bill." After the conference report was presented, there was a colloquy, quoted in petitioner's brief (p. 83), on the question whether the proposed legislation "changes in any way the present status of the basing-point plan now used by steel and cement and other natural-resource industries." 80 Cong. Rec. 9903. Senator Borah, to whom the question was directed, replied prudently, "I could not answer offhand, because I am not sure that I know the exact operation of the basing-point plan in the steel industry." Senator Davis stated, "Under the basing-point plan in the steel industry the markets all over the country are available for anyone who is engaged in that industry." On the basis of this description, Senator Borah replied, "My opinion would be that this does not have any effect upon that." Senator Van Nuys agreed. 80 Cong. Rec. 9904. The colloquy indicates that discriminations were not meant to be immune merely because they stemmed from a basing-point system; beyond that, it indicates either that a system of uniform delivered prices was not made illegal, or that the question of the validity of the basing-point plan in the steel industry was left unaffected by the bill.

The bills before Congress referred to by petitioners (Br. pp. 43-44) were comparable to the

provision in paragraph 5 of the amended House bill which was rejected. They would, to be sure, have rendered any basing-point system unlawful *per se*. They would, in fact, have required prices to be fixed f. o. b., at least at the purchaser's option. Thus, S. 4055, 74th Cong., 2d sess., on which extensive hearings were held, (*Hearings before the Committee on Interstate Commerce, United States Senate*) recited as its first purpose "to prevent methods of pricing under which certain industries follow the practice of making uniform delivered prices, \* \* \*." It would have made unlawful any addition "to the shipping point price of any commodity \* \* \* [of] a charge for delivery to destination other than the actual cost of delivery through such agency as the purchaser may elect to specify." It made no provision for any degree of absorption of freight charges within a concept of "due allowance," or for delivered prices fixed in good faith to meet competition, and the illegality of the delivered prices did not depend on any showing of effect on competition. It is quite understandable, therefore, that the Commission pointed out the greatly simplified task of enforcement under such a statute. See *Report to the President on Prices of Sheet Steel Piling* (1936) 41: "Once Congress has created an anti-basing point bill, the immense expense of separate investigation and the laborious trial of separate suits would be avoided."



(Pet. Br. p. 37). See also Hearings, *supra*, at 325, where Commissioner Freer stated: "It may be said that such enactment would avoid the delay, expense, and uncertainty of protracted and expensive litigation in each individual case in numerous industries." This is very different from an avowal that the Clayton Act and the Robinson-Patman Act do not render unlawful price discriminations resulting from the use of a basing-point system where all the requisites of the statute are shown to be present.

What was said in *Helvering v. Clifford*, 309 U. S. 331, 337-338 is applicable, *mutatis mutandis*, here: "In view of the broad and sweeping language of section" 2, "a specific provision covering" basing-point prices "might well do no more than to carve out of" the general prohibition "a defined group of cases to which a rule of thumb would be applied. The failure of Congress to adopt any such rule of thumb \* \* \* must be taken, to do no more than to leave to the triers of fact the initial determination of whether or not on the facts of each case" an unlawful discrimination exists.

The application of Section 2 (a) in the present case does not require or permit a consideration of the general merits or evils of basing-point systems. Petitioners contend (Br. 63) that the enforcement of Section 2 (a) as interpreted by the Commission would discourage the decentralization

of production. As indicated by the discussion in Congress (*supra*, pp. 35-36), this argument relates to a system of more or less uniform delivered prices over a market area, and not to a system of arbitrary price differentials like that here involved. Moreover, the record in this case discloses a trend toward centralization on the part of petitioners' customers, some of whom moved to Chicago where they were able to take advantage of petitioners' price system. The same tendency in other industries employing basing-point systems has been remarked by the Commission.<sup>7</sup> Much of the eco-

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<sup>7</sup> Referring to a prior report to the Senate, the Commission stated (Report of the Federal Trade Commission to The President With Respect to the Basing-Point System in the Iron and Steel Industry, November, 1934, p. 17; cf. p. 25):

The report of the Commission to the Senate stated that the power of selecting, discontinuing, or enlarging the number of basing points involved the power of deciding what cities should be built up as centers for the remanufacture and processing of steel products and what cities should be handicapped by not being recognized as basing points. It was pointed out that the tendency was opposed to what is commonly considered as desirable decentralization of industry. The exercise of this power under the basing-point system is predicated upon the negation of advantages of location bestowed by nature, thus building up industry on an artificial and uneconomic basis which in effect exacts an unnecessary subsidy from the public.

conomic controversy over basing-point systems is even more irrelevant to the present case.<sup>8</sup>

<sup>8</sup> One economic controversy has turned on the issue of the desirability in particular industries of a system of multiple basing-points with a high frequency of so-called freight absorption, a system unlike that of petitioners. Thus Professor de Chazeau, supporting some form of basing-point system for the steel industry, stated (*Public Policy and Discriminatory Prices of Steel*, 46 J. Pol. Econ. (1938) 537, 541):

It is well to reiterate that the ultimate issue between proponents of a basing-point and an f. o. b. mill plan for steel is whether geographic discrimination through freight absorption is in the public interest. Phantom freight in the delivered price of steel may be (and has been) reduced by a multiplication of basing points and by special regulations governing the computation of prices in given areas. Its further reduction or eradication may be advocated or opposed on other grounds, but the point is not vital to the pricing system. The same is not true, however, of freight absorption, the elimination of which would mean the death of the basing-point practice.

*Id.* at 565:

\* \* \* We found that *some* form of basing-point system (i. e., essentially, the right to absorb freight) is required by the structure of the industry and that consequent discrimination in pricing might necessitate some degree of public control. (Italics in original.)

Compare Fetter, *The New Plea for Basing-Point Monopoly*, 45 *id.* 577 (1937); 46 *id.* 567 (1938).

Another controversy turns on the extent to which a basing-point system producing identical prices in an industry is itself indicative of collusive action. Cf. Mund, *Monopolistic Competition Theory and Public Price Policy*, 32 Amer. Econ. Rev. 7: 7 (1942); Clark, *Imperfect Competition Theory and Basing-Point Problems*, 33 *id.* 283 (1943).

C. THE FINDINGS AND EVIDENCE SUPPORT THE COMMISSION'S DETERMINATION THAT PETITIONERS' DISCRIMINATIONS IN PRICE BETWEEN DIFFERENT PURCHASERS OF GLUCOSE HAVE THE ADVERSE EFFECT ON COMPETITION WHICH BRINGS THE DISCRIMINATIONS WITHIN THE CONDEMNATION OF SECTION 2 (A) OF THE ACT

Petitioners contend (Br. 45-47) that the words "to discriminate in price" apply to differences in price only when there is a "competitive relationship" between the purchasers concerned and the price difference is of substantial injury to the prejudiced buyers. But Section 2 (a) itself defines what competitive effects render price differentiations (not within any proviso of the section) illegal price discriminations. Plainly, no additional showing of competitive relationship or injury is required. Accordingly if, as previously shown, the statute applies to price discriminations of the kind resulting from petitioners' basing-point system of selling, the only question remaining open is whether the record supports the Commission in finding any of the effects on competition specified in Section 2 (a).

Petitioners contend (Br. 48-59) that the Commission's findings (directly based upon stipulated facts) are insufficient to support its conclusion that the freight "pick-up" or differential included in petitioners' higher price to purchasers in certain cities "may be substantially to lessen competition" or "to injure, destroy, or prevent competition with any person who \* \* \* knowingly receives the benefit" of the discrimina-

tion. To accede to this contention is to draw an inference from the undisputed facts contrary to that drawn by the Commission and sustained by the court below and would contravene the rule laid down in *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52, 63:

The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission.

See also *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 73; *National Labor Relations Board v. Southern Bell Tel. & Tel. Co.*, 319 U. S. 50, 60.

The findings set forth that a difference in price of a small fraction of a cent per pound is sufficient to divert trade as among manufacturers of candy which does not carry a trade name and is sold to volume purchasers; that glucose is the principal ingredient of such candy; that petitioners discriminate in price between such purchasers by including in the higher price to certain purchasers a fictitious freight charge ranging from  $\frac{1}{10}$  to  $\frac{4}{10}$  cent per pound; and that payment of the higher prices represented by this fictitious charge diminishes the ability of the purchasers to compete with those paying petitioners' lower prices (*supra*, pp. 7, 9-10).

We submit that these undisputed facts not only justify but require the inference that petitioners' price discriminations will probably substantially

lessen competition. As the court below said, "We think it irrefutable from the facts that resulting substantial loss is reasonably likely to accrue to purchasers in the less favorably located communities" (R. 531). The purchasers compelled to pay the arbitrary freight differential have one of two choices—either to absorb the additional cost of their raw material in their own selling prices, thus narrowing profit margins perhaps to the vanishing point, or to attempt to pass on the additional cost to their own customers, with consequent loss in volume of sales. Either course leads to an impairment of the purchasers' ability to compete and will probably substantially lessen the competition of those adversely affected.

Nor can petitioners derive comfort from the finding (R. 474) that the effect of their discriminatory prices in lessening competition may be "avoided or augmented" by differences among purchasers of their glucose in other cost factors such as labor, taxes, proximity to markets, etc. This finding, to the extent that it is relevant, supports the inference that, at least as to some of the purchasers affected, the discriminatory prices are likely to force them out of the field of produc-

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<sup>2</sup> As the Federal Trade Commission has remarked, "Advantages whose effect 'may tend' partially to offset the effect denounced by the statute have no logical bearing upon the legal status of the practice prohibited." *Chain Stores, Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st sess. (1934).



tion of cheap candy for volume purchasers. In this connection the finding that some candy manufacturers formerly located elsewhere than Chicago have subsequently moved to that city is not without significance.

The case thus falls squarely within the rule laid down in *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, the authority upon which petitioners chiefly rely. In that case, involving the prohibition in Section 3 of the Clayton Act of tying-clause agreements the effect of which "may be to substantially lessen competition," the Court said (p. 356) that the Clayton Act sought to reach the practices embraced within its sphere "in their incipiency." And the Court said (pp. 356-357) that the purpose in using the word "may" was not to prohibit "the mere possibility of the consequences described" but was to prevent such agreements as would under the circumstances disclosed "probably lessen competition."

Petitioners also rely upon *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291, where it was held that the Commission's finding that International Shoe's acquisition of the capital stock of another shoe company might have the effect of substantially lessening competition between the two companies was without support in the evidence. The Court, having reached the conclusion that the evidence affirmatively showed absence of any substantial competition between

the acquiring and the acquired corporations,<sup>10</sup> said (p. 298) that Section 7 of the Clayton Act does not prohibit "the lessening of competition, which, to begin with, is itself without real substance."

There is not in the present case, as there was believed to be in the *International Shoe* case, affirmative evidence establishing no substantial competition between those affected by the acts or practices against which the statutory prohibition is directed. In contrast, the undisputed findings in the instant case fully support the inference of substantial competition between the beneficiaries of petitioners' lower price and the purchasers discriminated against in price. Petitioners' sales of glucose are nation-wide, the sales are "largely" to candy manufacturers, and the purchasers most affected by discriminatory prices are companies making cheap candy for sale on a strictly price basis to chain stores and others purchasing in large quantity, in other words, to those who buy candy for sale, not in a local market, but for distribution over wide areas (R. 467, 474).

Petitioners also cite (Br. 49) certain decisions by lower federal courts dealing with the effect on competition which will render a tying-clause agree-

<sup>10</sup> The bases for this conclusion were (1) that the companies were competitive only as to products of the same character and offered to the same class of customers and (2) that officers of *International Shoe* had testified to the absence of any real competition. See, however, the dissent by the present Chief Justice, concurred in by Justices Holmes and Brandeis (280 U. S. 291, 303-306).

ment or a stock acquisition illegal under Section 3 or Section 7 of the Clayton Act. These cases all undertake to apply the interpretation given the statute in the *Standard Fashion* case or the *International Shoe* case and add little, by way of analysis or reasoning, to those decisions. We therefore believe it unnecessary to discuss the individual lower court rulings to which petitioners refer.

In considering the meaning which is to be placed upon the prohibition in Section 7 against acquisitions of stock where the effect may be substantially to lessen competition between the companies in question, it is to be borne in mind that the competition which is lessened is that of a company whose stockholder-owners have acceded thereto by agreeing to part with their stock. There might, in this situation, be some basis for holding that the prohibition is confined to acquisitions tending to bring about a lessening of competition sufficiently substantial in character to be of public concern. The victims of discriminatory prices, on the other hand, rarely, if ever, voluntarily assent to the discrimination. The obvious purpose of the statute is to offer protection to the individual concerns suffering from price discrimination. Clearly, as to Section 2, the sole test must be whether there is reasonable probability that their competition will be substantially lessened by the discrimination, and there is no justification for importing the further test of whether there is probability of a lessening

of competition on such a scale as to be against the public interest.

We have up to this point discussed solely the provisions of Section 2 (a) which make price discrimination illegal if the effect may be substantially to lessen competition. But the section also renders illegal any discrimination if the effect may be to "injure \* \* \* competition with any person who \* \* \* knowingly receives the benefit of such discrimination." This language does not appear in Section 3 or Section 7 of the Act, or in Section 2 prior to its amendment by the Robinson-Patman Act. Its clear meaning is to protect persons against price discrimination injurious to their ability to compete, without a further requirement of a showing that competition is "substantially" injured.

As to whether Chicago or other favorably located purchasers "knowingly" receive the benefit of a discriminatory price, the court below pointed out that petitioners' pricing system is "well known to the public" and customers in favorably located cities therefore know that they are receiving a price which does not include the fictional freight charge included in the higher prices paid by purchasers in other cities (R. 533). Petitioners urge (Br. 57) that purchasers are without knowledge of discrimination because they do not know when they place their orders whether shipment will be made from Chicago or from Kansas City. But purchasers know that petitioners will ordinarily,

if not almost universally, ship from the point giving petitioners the greater return, that is, from the place which will yield them a fictional freight charge in the price received. The purchasers in the favored localities therefore know that they are granted on most of their purchases a price which does not include the fictional freight charge being paid on substantially all purchases made in the localities in which this charge is included in the price. Furthermore, the Commission found that actual sales occur not when orders are placed but when delivery is made (R. 472). At time of actual sale, therefore, the benefit of the discrimination is "knowingly" received."

## II.

PETITIONERS, BY ALLOWING CERTAIN FAVORED CUSTOMERS OF GLUCOSE TO BOOK ORDERS OR TO OBTAIN DELIVERIES, FOLLOWING A PRICE ADVANCE, AT THE PRECEDING LOWER PRICE BEYOND THE PERIOD ALLOWED PETITIONERS' OTHER CUSTOMERS, VIOLATED SECTION 2 (A) OF THE ACT.

We have previously described (*supra*, pp. 8-9) the booking practices which the Commission determined constituted illegal price discriminations,

"The record so convincingly demonstrates that the price discriminations are "knowingly" received by the beneficiaries thereof that it is unnecessary to consider whether, under the statute, the knowing receipt of a benefit must be proved in the case of persons who are direct "customers of" the grantor of the discrimination, as is the case here. The word "knowingly," which appears not to qualify "customers of" the grantor, was evidently inserted through an erroneous impression that buyers were penalized under Section 2 of the

i. e., permitting customers generally to book orders at the old price, following a price advance, only within a 5-day period and permitting delivery under such orders only within 30 days after the advance but allowing certain favored customers to book orders and to obtain delivery beyond the respective 5-day and 30-day periods. In addition, certain favored tank wagon customers who had entered orders in tank car lots were permitted to take delivery under their orders for extended periods of time when petitioners' other tank wagon customers were required to purchase at the higher prices established in the interim by petitioners.

Petitioners contend (Br. 64-66) that their booking practices constitute discriminations not in "price" but in "terms of sale" and that Congress intended to exclude terms of sale from the price discriminations prohibited by subsection (a) of Section 2, as evidenced by the fact that terms of sale are specifically dealt with in subsections (c), (d), and (e) of Section 2. It is true that the bill as originally reported to the Senate prohibited discrimination both in price and in "terms of sale" (Sen. Rep. No. 1502, 74th Cong., 2nd Sess.) and that the latter words were stricken by the Conference Committee. The Conference Commit-

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Clayton Act, as under Section 3 of the Robinson-Patman Act. See 80 Cong. Rec. 6350, 6351; cf. H. Rep. 2951, 74th Cong., 2d sess., pp. 5-6.




tee, in reporting on this deletion, said (H. Rep. No. 2951, 74th Cong., 2nd Sess., p. 5):

The managers were of the opinion that the bill should be inapplicable to terms of sale except as they amount in effect to indirect discriminations in price within the meaning of the remainder of subsection (a).<sup>12</sup>

The Conference report thus makes it clear that subsection (a) applies to terms of sale where they "amount in effect to indirect discriminations in prices." Certainly a practice whereby favored customers are given a lower price for glucose in circumstances in which this lower price is unavailable to their disadvantaged competitors is an indirect, if not a direct, discrimination in price falling within subsection (a).

Petitioners also rely (Br. 65-66) on the third proviso in subsection (a) reading: "That nothing herein contained shall prevent persons engaged in selling goods \* \* \* from selecting their own customers in bona fide transactions and not in restraint of trade." The argument is that booking an order for future delivery with one customer, while refusing to make with another customer

<sup>12</sup> Petitioners in quoting this sentence (Br. 65) from the conferees' report have inadvertently substituted the word "subsection" for "subsection (a)." In view of the actual language of the report, petitioners are obviously in error in arguing that the "remainder of the subsection" referred to in the above report includes subsections (b), (c), and (e) of Section 2.



the same kind of contract, amounts merely to a selection of the customers with whom they will deal. But petitioners in fact are dealing with both sets of customers, granting to some a discriminatory price denied to others, and are therefore not merely selecting from among their customers those with whom they choose to deal.

Petitioners also contend (Br. 66-67) that they are within the proviso of subsection (b) of Section 2 which states that nothing contained in the section shall prevent a seller rebutting a prima facie case of discrimination by showing that his lower price "was made in good faith to meet an equally low price of a competitor." Petitioners object to the fact that, despite testimony which they presented purporting to establish that their "booking" discriminations were made in good faith to meet equally low prices of competitors; the Commission made no findings as to the existence or non-existence of good faith. The court below, in dealing with this point, said that the testimony offered by petitioners to justify their action under subsection (b) was "general in character and vague in effect" (R. 534). The court said further (*ibid.*):-

There was no testimony as to specific instances or facts but merely a conclusion upon the part of the witnesses that the *prima facie* case of discrimination was justified by competition. This, it seems to

us, is not the sort of testimony sufficient to sustain a finding of exemption provided by Congress for meeting competition or to justify a finding that the *prima facie* case of discrimination as to booking practices has been rebutted.

The meaning of the proviso of subsection (b), in the light of the legislative history of the Robinson-Patman Act, is discussed in the Government's brief (pp. 23-27) in the related, pending case of *Federal Trade Commission v. Staley Manufacturing Co.* (No. 559, this Term) and the application of the proviso to testimony similar to that upon which the present petitioners rely is dealt with in that brief (pp. 31-36). Under the views there set forth the testimony in the present case, if within the characterization thereof given by the court below, plainly does not establish justification under subsection (b). We submit that the testimony to which petitioners refer (R. 220, 221, 227) falls within the court's characterization of it and that petitioners have therefore failed to make out a defense, under subsection (b), of their booking practices.

Petitioners also contend (BR 67-68) that there was failure to show the effect on competition which would bring the price discriminations given in connection with "booking" under the prohibitions of subsection (a). The facts and law relevant to this question are precisely the same as

those already discussed (*supra*, pp. 41-48) with reference to the competitive effect of the price discriminations growing out of petitioners' basing point system of selling and need not be repeated here. And while petitioners suggest that the relevant facts were stipulated only as to price discriminations involving their basing point system of selling, the stipulation was not so confined but was entered into "with reference to the matters alleged in Count I" of the amended complaint (R. 195). This count charges in general terms that petitioners violated subsection 2 (a) of the Act by selling glucose and certain other products at discriminatory prices (R. 10-12).

Petitioners deal as a separate point (Br. 69-70) with discriminatory prices given to certain tank wagon purchasers. What the Commission found to be illegal was permitting certain tank wagon customers to obtain deliveries for periods of approximately 90 days after the giving of their orders although during the latter part of such time their other tank wagon customers were, because of intermediate price advances made by petitioners, required to pay higher prices (R. 472-473). The testimony presented by petitioners that certain competitors had offered to sell in tank car lots to petitioners' favored tank wagon customers is not related to the violation found by the Commission, namely, allowing an extended period for booking delivery under orders placed with petitioners.

## III

PETITIONERS' DISCOUNTS OR ALLOWANCES TO VARIOUS CUSTOMERS PURCHASING GLUTEN FEED AND MEAL, AND TO KEEVER STARCH COMPANY AND STEIN-HALL COMPANY IN CONNECTION WITH THE SALE OF STARCH, CONSTITUTE VIOLATIONS OF SECTION 2 (A) OF THE CLAYTON ACT, AS AMENDED.

## A. THE FACTS CONCERNING THESE DISCOUNTS OR ALLOWANCES

As a product of their corn refining operations, petitioners produce gluten feed and meal in the amount of more than 250,000 tons annually, which is approximately 40 to 50% of all such products used in the United States (R. 108, 109, 474). Unlike their pricing methods on glucose, petitioners sell the gluten feed and meal produced at their Kansas City plant at the Kansas City price plus freight to destination; and the feed and meal produced at their Pekin and Argo, Illinois, plants, at the Chicago price plus freight to destination (R. 475). There are some 3,000 customers for these products scattered throughout the country (R. 474). However, six large purchasers have by special contracts or agreements been given allowances of 50 cents per ton, and in some cases 65 cents per ton, off their regular market price (R. 186-190, 475-479). These purchasers are Allied Mills, Inc., Chicago, Ill.; Cooperative G. L. F. Mills, Inc., Buffalo, N. Y.; E. W. Bailey & Co., Montpelier, Vt.; Jesse C. Stewart & Co., Pittsburgh, Pa.; Marshfield Milling Co., Marsh-

field, Wis.; and Farley Feed Co., Janesville, Wis. (R. 186-190, 475).

It was stipulated by the parties and found by the Commission that the purchasers who were the beneficiaries of these allowances were in competition with other dealers to whom petitioners sold gluten feed and meal without such allowances, both in the sale of prepared mixed or branded feed products and in the resale of feed and meal products unmixed (R. 186-190, 476-479). It was further stipulated and the Commission found that the 50 cents per ton allowance is "sufficient, if and when reflected, in whole or in substantial part in resale prices, to attract business" to the favored companies away from their competitors "or to force said competitors to resell such feed and meal products at a substantially reduced profit or to refrain from reselling" (R. 188-190, 479). These allowances were "sufficient to substantially increase" the respective "margins of profit over and above the margins of profit otherwise obtainable in the resale of such feed and meal products" (R. 189, 190, 479). It was also stipulated that the petitioners had not produced and would not offer evidence that these allowances did not make more than due allowance for differences, if any, in the cost of manufacture, sale, or delivery (R. 191, 479, 480).

Since June 19, 1936, petitioners have sold substantial quantities, amounting to many millions of pounds, of certain kinds of starch and starch



products to Keever Starch Company, Stein-Hall Company, and competitors of Keever Starch Company and Stein-Hall Company. Discounts and allowances from petitioners' prices were made to Keever Starch Company and Stein-Hall Company, but not to their competitors (R. 191, 192, 480). Petitioners make no contention that these discounts or allowances were justified by savings in the cost of manufacture, sale or delivery resulting from the different methods by which the starch was sold to these concerns as compared with its sale to other buyers (R. 192, 193, 481). As in the case of gluten feed and meal allowances, such a discount or allowance was sufficient to substantially increase Keever's and Stein-Hall's respective margins of profit over and above the margin of profit otherwise obtainable in the use, consumption, and resale of starches and starch products, and is sufficient, if and when reflected in whole or in substantial part in resale prices, to attract business to Keever and to Stein-Hall away from their competitors, or to force such competitors to resell said starches and starch products at substantially reduced profit, or to refrain from reselling. The said discount, rebate, commission, or other allowance granted Keever and to Stein-Hall may be sufficient to attract the business of such purchasers away from competitors of petitioners, or to force said competitors to sell such starches and starch products at substantially reduced

profit, or to refrain from selling (R. 480, 481, 192, 193):

**B. THESE ALLOWANCES AND DISCOUNTS HAVE THE EFFECT ON COMPETITION NECESSARY TO BRING THEM WITHIN THE SCOPE OF SECTION 2 (A) OF THE CLAYTON ACT**

Petitioners challenge none of the Commission's findings, but repeat in connection with these discounts the same argument that they have made with respect to the basing point method of pricing glucose. They urge that these allowances and discounts have not been demonstrated by the Commission to have had a substantial effect on competition. The impact of a price allowance of this general character and extent on a low-cost bulk commodity, where slight changes in cost or price translate themselves automatically into either diminishing net profits or diminishing net volume of sales, and the fact that Section 2 (a) was meant to cover price discriminations which had such an impact, have been extensively discussed in connection with the basing point method of pricing glucose (*supra*, pp. 41-48) and need not be repeated here.

**IV**

**PETITIONERS' ADVERTISING ARRANGEMENT WITH THE CURTISS CANDY COMPANY CONCERNING DEXTROSE VIOLATES SECTION 2 (E) OF THE CLAYTON ACT**

**A. THE FACTS CONCERNING PETITIONERS' ADVERTISING ALLOWANCE TO CURTISS**

While the facts concerning this aspect of the case were not stipulated, the evidence on which

the Commission relies is not disputed by the petitioners:

(1) In 1936, and prior thereto, dextrose, also known as refined corn sugar, was a new product to the housewife, the consumer, and the confectionery industry (R. 174). Although petitioners had been manufacturing and selling dextrose before 1936, approximately 80% of their dextrose business had been with the baking industry. Petitioners desired to expand the use of dextrose by other industries, including candy manufacture (R. 175). This involved persuading those manufacturers to engage in considerable research to determine whether they could use dextrose in the manufacture of candy (R. 175). Petitioners at first approached two candy manufacturing companies, the Bachman Chocolate Manufacturing Company and the Lewis Candy Company, with the idea of persuading those companies to use dextrose and to publicize, through their advertising and sales media, the use of dextrose as an ingredient in their candies; but these experiments, which involved the expenditure of \$8000 and \$30,000, respectively, failed (R. 61, 62, 180, 181). Petitioners also approached the Mars Candy Company with a similar proposal, but that company was unwilling to undertake the experiment (R. 62). Then, in 1935 and 1936, petitioners entered into negotiations with the Curtiss Candy Company with a similar end in view. Finally, in September, 1936, after Curtiss had done research for

about a year, with petitioners' help, to ascertain whether dextrose could be used in its candies, Curtiss entered into the arrangement described in paragraphs (2) and (3) herein (R. 175, 296, 316, 317, 481). Curtiss had as wide a distribution and was as aggressive as any other candy manufacturer in the United States, and its national advertising over a period of ten years was almost equal to that of all the others in the field (R. 300, 301, 481).

(2) Pursuant to the September, 1936, arrangement, petitioners have spent over \$750,000 within the three-year period 1936-39 for the purpose of advertising Curtiss candies as being rich in dextrose (R. 297, 482, 483). During the same period, although Curtiss was left free to purchase dextrose from other companies producing and selling dextrose (R. 296, 297, 318), it has in fact purchased none from anyone except petitioners (R. 294, 295), and its purchases of dry dextrose from petitioners increased over fivefold, reaching a total of seven million pounds in 1939 (R. 291, 484). During the same period; Curtiss increased its purchases of glucose (which contains substantial amounts of dextrose) from petitioners, from nothing in 1937 to almost 15 million pounds in 1939, representing almost 60% of its total purchases (R. 291, 292, 484).

(3) Neither petitioners nor Curtiss were under any contractual obligation to spend any definite amounts or any amount at all for advertising

(R. 61, 318, 483). During the three-year period when petitioners were spending \$750,000 in advertising the dextrose used in Curtiss candies, Curtiss' total advertising expenditures were at least twice as large as those of petitioners (R. 61, 177). Curtiss also, at substantial expense to itself, agreed to show the words "rich in dextrose" on all of its wrappers and other containers, in its display advertising, and upon the uniforms of its peddlers (R. 174, 179, 302, 303, 317, 482). However, Curtiss agreed to and did place its national radio and magazine advertising through petitioner's advertising agency, and advertisements were worked up in which Curtiss advertised its candies as containing dextrose, and petitioners advertised the use of dextrose as an ingredient in Curtiss candies (R. 178, 297, 485).

(4). During the three year period in which petitioners were spending \$200,000 or more a year to advertise Curtiss candies, they spent nothing for advertising the candies of any other customer purchasing dry dextrose from them (R. 57, 485). Furthermore, they have instructed their salesmen to advise customers to whom they sold products to be used in candy manufacture that they do not contribute to the advertising done by customers (R. 162, 485). However, petitioners' vice president testified that petitioners are ready at any time to enter into similar advertising arrangements on a proportional basis with any other candy manufacturer who is willing to use



sufficient dextrose in his candy to advertise it as "rich in dextrose," to advertise the dextrose content as a feature of his candies on labels, boxes, and store advertising, and to change his wrappers and other advertising media for the purpose; in addition, the arrangement would be dependent on "their product, their distribution, their sales force, and the type of organization they have" (R. 179-180).

B. CURTISS CANDY COMPANY IS A "PURCHASER" OF A COMMODITY WITHIN THE MEANING OF SECTION 2 (E)

Most of petitioners' objections to the Commission's conclusion that these facts support a violation of Section 2 (e) are based on what the Government considers illicit interpretations of Section 2 (e), involving, as a matter of fact, the ingrafting of restrictive language on its literal text. For this reason, it seems appropriate to repeat the language of Section 2 (e):

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Petitioners contend that the advertising ar-



rangement which has just been described does not fall within Section 2 (e), because the arrangement was not made with the Curtiss Candy Company "as a purchaser" from petitioners, but was an entirely fortuitous matter unrelated to Curtiss' purchases from petitioners. Such a disavowal of the connection between the lavish expenditures which petitioners made to advertise Curtiss candies exclusively, and the tremendous increase in Curtiss' purchases of dextrose and glucose from petitioners, taxes credibility. However, it is not necessary to stress this point, because petitioners' argument requires, on its legal side, that the statute be reworded to read as follows: "It shall be unlawful for any person to discriminate, in a *purchase contract*, in favor of one purchaser against another purchaser \* \* \*". [italics indicate new language impliedly inserted in the statute by petitioners]. To insert such restrictive language by administrative or judicial action is to deprive the remedial statute of effectiveness by allowing the form of the transaction to determine its substantive legality. To leave such an obvious loophole for avoidance of the congressional purpose would be a wholly unwarranted exercise of statutory construction.

C. CURTISS CANDY COMPANY IS THE PURCHASER OF A COMMODITY "BOUGHT FOR RESALE WITH \* \* \* PROCESSING" WITHIN THE MEANING OF SECTION 2 (E)

Petitioners' next restrictive parsing of the statute is based on the argument that Curtiss

buys dextrose from petitioners, uses it in the manufacture of candy together with other ingredients, and produces an entirely new commodity called "candy." Petitioners argue that, on the basis of the industrial operations involved, the Commission has advanced no evidence which justified it or this Court in holding that Curtiss was the purchaser "of a commodity bought for resale, with or without processing."

The simple question posed is whether the dextrose which Curtiss buys can be described as a commodity bought by it for resale "with processing." There appears to be nothing in the legislative history of the Robinson-Patman Act specifically concerned with the definition of the term "processing," although analysis of the circumstances and committee reports which led to the passage of the Act would seem to confirm the Government's conclusion that the term is applicable to the operations of Curtiss with respect to the dextrose purchased by it; see pp. 68-69, *infra*. The conversion of dextrose into candy conforms to the present-day administrative understanding of the term "processing," in which Congress has acquiesced, and satisfies the formal definitions of processing contained in the few court cases which have had occasion to define the term.

The literal meaning of words used in a statute will be given effect wherever possible. *United States v. Standard Brewery, Inc.*, 251 U. S. 210, 217; *United States v. Merriam*, 263 U. S. 179, 187;

*United States v. Missouri Pacific Railroad Co.*, 278 U. S. 269, 277. The conversion of dextrose into candy meets the definition of "processing" adopted by the Court in *Cochrane v. Deener*, 94 U. S. 780, 788, which has been cited with approbation in subsequent cases:

A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing.

See also *P. E. Sharpless Co. v. Crawford Farms, Inc.*, 287 Fed. 655, 658 (C. C. A. 2); *Bedford v. Colorado Fuel & Iron Corporation*, 81 P. (2d) 752, 757 (Colo.). The *Cochrane* and *Sharpless* cases are doubly persuasive in that they deal with the processing of food products; and candy, into which dextrose is processed, is a food product. It is also clear that a raw material which is processed into a manufactured product may be "transformed \* \* \* to a different state" not only by mechanical means (as petitioners appear to urge), but by chemical means as well. See *Bedford v. Colorado Fuel & Iron Corporation*, 81 P. (2d) 752, 757 (Colo.); cf. *Kennedy v. State Board of Assessment and Review*, 276 N. W. 205, 206 (Iowa).

Not only do decisions define processing in such a way as to embrace the conversion of dextrose into candy, but processing taxes have been levied since 1933 on various chemical transformations of

agricultural staples that change completely the identity of the original commodity; e. g., corn converted into dextrose; beets and cane into sugar; and grain into whiskey. Likewise never challenged by the taxpayer or the courts, and specifically acquiesced in by the Congress, is the application of a tax on the "processing" of coconut oil into shortening powder or soap. *Colgate-Palmolive-Peet Co. v. United States*, 320 U. S. 422; *Loose-Wiles Biscuit Co. v. Rasquin*, 95 F. (2d) 438 (C. C. A. 2), certiorari denied, 305 U. S. 611; *Tasty Baking Co. v. United States*, 38 F. Supp. 844 (Court of Claims), certiorari denied, 314 U. S. 654; *Cincinnati Soap Co. v. United States*, 22 F. Supp. 141 (S. D. Ohio). Not once has the suggestion been raised that the type of chemical alteration involved in these cases is not validly described as a processing.

In *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8), cited by petitioners (Br. p. 76), the court said (p. 57) that the meaning of the word "processing" as used in that case was not to be determined in the abstract but "must be controlled by the context and the legislative intent" and that a remedial statute was entitled to a liberal construction. That case involved the interpretation of a provision of the Fair Labor Standards Act of 1938 exempting from the operation of the Act employees engaged in "processing" certain aquatic forms of animal and vegetable life or by-products thereof. The Act as a whole was to be construed

liberally, and therefore this exemption had to be construed strictly. The court accordingly held that the making of buttons from the shells of fresh-water clams was so far removed from the type of processing which the exemption was intended to cover (i. e., the preservative treatment and preparation for market of perishable products) as not to fall within the exemption. The *Fleming* case, therefore, besides being limited to its own peculiar facts and statutory language, supplies a rule of statutory interpretation which would clearly substantiate the application of the term "processing" to the conversion of dextrose into candy.

This Court, in the somewhat different context of *N. L. R. B. v. Hearst Publications*, 322 U. S. 111, has pointed out that terms "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship," and that "where all the conditions of the relation require protection, protection ought to be given" (p. 129). The Congressional Committee sponsoring the Robinson-Patman Act clearly set forth that the purpose of adoption of the Act was "to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business position or in the cost of serving them." S. Rep. 1502, 74th Cong. 2d sess., p. 3; H. Rep. 2287, 74th Cong., 2d sess., p. 7; *General Shale Products Corp. v. Struck Construction Co.*, 37 F. Supp. 598, 602 (W. D. Ky.)). Certainly no "sound economic differences" have been advanced

by petitioners for justifying the discrimination involved in their allowances to Curtiss.

While there is no evidence of the way in which Section 2 (e) attained its present form, the disputed language in the subsection is most easily understood by reading it consecutively. Section 2 (e), like the statute as a whole, is a remedial provision intended to make unlawful a discrimination "in favor of one purchaser against another purchaser or purchasers of a commodity." Lest the Federal Trade Commission be confronted with the impossible burden of policing retail sales to ultimate consumers and in order to limit the section to wholesale transactions, the limitation was added that the commodity be "bought for resale."

Lest manufacturer-distributors be exempted from the scope of the Act and petitioners' point be raised that a commodity which was processed into different form and then resold was not "bought for resale," the explanatory words "with or without processing" were added. That Congress intended to include manufacturer-distributors as well as wholesaler-distributors within the scope of Section 2 (e) is further borne out by the fact that the services or facilities the furnishing of which are prohibited by the section include not only those connected with "the handling, sale, or offering for sale" of the commodity, but "services or facilities connected with the processing" thereof.

The Robinson-Patman Act was largely the outgrowth of a desire to protect independent busi-



nessmen and merchants from discriminatory competition arising out of the superior purchasing power of large national and regional chains. Foremost among the studies relied on by the sponsoring committees of the bill was the Final Report on its Chain Store Investigation submitted by the Federal Trade Commission, S. Doc. No. 4, 74th Cong., 1st Sess., which contained a comprehensive analysis of the competitive practices and buying advantages of the chains. S. Rep. No. 1502, 74th Cong., 2d Sess., p. 2; H. Rep. No. 2287, 74th Cong., 2d Sess., p. 3. That report made explicit what was already common knowledge, to wit, that many chains manufactured a substantial part of the commodities wherewith their stores were supplied. It specifically pointed out that, in the case of confectionery, shoe, and ready-to-wear clothing chains, manufacturing was the primary business, with the operation of chain stores as a secondary consideration; that manufacturing chains operated over 50% of the total number of stores in nine kinds of business (including the confectionery business, of which Curtiss is a member), and are responsible for over 50% of the total sales of all chains operating in three lines of business, including the confectionery line; and that over 70% of the sales of manufacturing chains in seven kinds of business, including confectionery, is represented by goods of their own manufacture (pp. 12-14). When these factors

are properly appraised it becomes clear why Congress was assiduous to include within section 2 (e) purchases which were subject to "processing" before being resold. It also becomes apparent that to allow purchases by these manufacturing chains to escape from the application of the Robinson-Patman Act, merely because they subject their purchases to manufacturing processes, is to remove from the protection of the Act small competitors in all of these lines whom it was the primary purpose of Congress to protect. Furthermore, to allow manufacturing chains (and, by the same token, manufacturing industries) to purchase without regard to the anti-discrimination provisions of section 2 (e), is to give such types of business operations and lines of industry an unwarranted advantage over pure wholesalers or distributors, whose purchases remain subject to the provisions of the section.

Both the processor and the process are therefore within the fair contemplation of Section 2 (e). Curtiss was a distributor of candy as well as a candy manufacturer. In fact, the record clearly shows that Curtiss made very large expenditures in order to advertise the distribution of their candies on a national scale, and that a predominant feature of that national advertising was the emphasis which it placed upon dextrose as a constituent of candy. Furthermore, to limit "processing" to mechanical as contrasted with chemical alterations of a commodity is to insert

an irrational exemption into the statute, one which will result in arbitrarily different treatment of different classes of manufacturer-distributors because of a mere physical difference in the nature of their processing operations and not for any valid economic reason.

This case does not involve petitioners' hypothetical query as to whether a baking company which used iodized salt in its bread could properly describe such bread as "processed iodized salt," for dextrose cannot with any semblance of reason be described as a minor ingredient in the manufacture of candy. It was stipulated and found by the Commission and by the court below that dextrose constituted as much as 90% of cheaper candies by weight. (R. 485.) To argue that such a preponderant component of a final manufactured product is not in fact processed into such a product would read an irrational exemption into Section 2 (e) depriving of its protection that large class of manufacturers who employ chemical rather than mechanical procedures in their processes of manufacture.

**D. PETITIONERS' ADVERTISING ALLOWANCES TO CURTISS CONSTITUTE DISCRIMINATIONS AGAINST OTHER "PURCHASERS OF A COMMODITY" WITHIN THE TERMS OF SECTION 2 (E)**

Petitioners contend that there is no proof present in this case of discrimination between purchasers of dextrose for resale. Their argument in this regard is a threefold one,—first, that there was no evidence in the record or finding by the

Commission that the dextrose sold by petitioners to other companies than Curtiss engaged in the manufacture of candy was in fact used by those companies in the manufacture of candy; second, that even assuming the dextrose to have been so used, these other companies, like Curtiss, were not "purchasers of a commodity for resale, with processing"; and third, that no proof was made that any of the four concerns named as competitors of Curtiss had in fact suffered injury or that the advertising arrangement with Curtiss was of a nature which those four concerns desired and which petitioners denied to them. The second of these contentions is the same as that made with respect to Curtis itself, and has just been dealt with (see *supra*, pp. 63-71).

With respect to the first contention, the president of Curtiss himself testified that four manufacturers of package candies, Nutrine Candy Company, E. J. Brach & Sons, M. J. Holloway Company, and Chase Candy Company, were in a greater or less degree competitors of Curtiss (R. 301). The quantities of dry dextrose which were sold by petitioners to these companies during the period 1936-1939 were stipulated in the record, without any objection as to materiality or relevance being raised by petitioners' counsel (R. 320-321); certainly, if these purchases were not in fact used in the manufacture of candy, they would have no place in the record. The

Commission's finding on this point does not refer to specific named firms, but to competing candy manufacturers as to whom it was stipulated first, that substantial quantities of dextrose were delivered; second, that no offer of advertising allowances on equal terms were made (and, who, as a matter of fact, were advised by petitioners' salesmen that no such services were furnished); and third, that no such allowances or services were in fact furnished (R. 485). Petitioners themselves have conceded in their briefs the probability that the dextrose was in fact used in the manufacture of candy.

With respect to petitioners' third contention, it seems clear that where one customer obtains a substantial advertising allowance of \$750,000 over a period of three years, and four other customers during the same period obtain no advertising allowances at all (R. 294, 295, 297, 482, 483), the first customer has received a benefit and the four other customers have been correspondingly disadvantaged. So much of petitioners' assertion that the Commission has failed to establish discriminatory effects as rests upon their contention that Curtiss' four competitors did not desire advertising allowances or services covers considerations that duplicate those involved in petitioners' fifth point, which is next dealt with (*infra*, pp. 74-75).

E. PETITIONERS' ADVERTISING ALLOWANCES TO CURTISS CONSTITUTED A "FURNISHING" AND "CONTRIBUTING TO THE FURNISHING OF \* \* \* SERVICES OR FACILITIES CONNECTED WITH \* \* \* HANDLING, SALE, OR OFFERING FOR SALE" OF THE DEXTROSE PURCHASED BY CURTISS, WITHIN THE MEANING OF SECTION 2 (E)

Petitioners contend that the advertising arrangement entered into with Curtiss did not involve "the furnishing or contribution to the furnishing" on their part of "any services or facilities connected with the processing, handling, sale, or offering for sale" of the dextrose purchased by Curtiss from them. Here, once again, they read into the section a requirement which has no basis in its language, for their argument is based on the fact that the publicity provided by the advertising arrangement was of immense value to petitioners, and that they did not enter into the arrangement as a service to Curtiss. Obviously, advertising services or allowances possess value for the sellers who afford them to favored buyers; it is implicit in his extension of advertising allowances to a buyer that the seller reaps benefits therefrom as well as the buyer. It likewise seems clear that these allowances were "services and facilities" to Curtiss irrespective of any statements by either the grantor or the grantee of the allowance formally designating them as such. To eliminate from the coverage of Section 2 (e) situations where advertising allowances happen to be dictated by the self-interest of the



grantor of the allowance, or are not in written and formal terms proclaimed as services to the purchaser, would be to nullify completely the language and purpose of the statutory provision, which requires no more than that the facilities or services furnished a preferred buyer be "connected with the \* \* \* handling or offering for sale" of commodities purchased.

F. PETITIONERS FURNISHED ADVERTISING ALLOWANCES TO CURTISS "UPON TERMS NOT ACCORDED TO ALL PURCHASERS ON PROPORTIONALLY EQUAL TERMS," WITHIN THE MEANING OF SECTION 2 (E)

Petitioners' only point with respect to the Curtiss advertising allowance which is predicated in any substantial way on disagreement with the Commission's findings is their argument that there has been no failure on their part to accord the same arrangement to others of their purchasers on proportionally equal terms. They rely on the fact that they had offered a similar arrangement to other companies before it was offered to the Curtiss Candy Company in 1936, and had, in fact, entered into a similar arrangement with at least two other candy manufacturers; that petitioners' officers testified to their willingness to make similar arrangements with other concerns who were similarly situated to Curtiss with respect to their distribution and advertising; and that there was testimony that no other customer had sought such an arrangement with the petitioner, and that consequently no other customer had been refused.

Petitioners' argument ignores several facts. In the first place, neither the fact that petitioners offered advertising allowances to other companies prior to 1936 (conceding that such offers were commensurate with that entered into with Curtiss), nor their statements of willingness to extend such allowances to other customers in the future, made in 1939 (after they had already been accused of violating the Robinson-Patman Act in this regard) are relevant to the main issue. These facts are no evidence at all as to whether they offered such arrangements to petitioners' competitors on "proportionally equal terms" during the period 1936-1939, when they were conferring \$750,000 worth of advertising allowances on Curtiss. Furthermore, the "experiments" which had been made prior to 1936 with the Bachman Chocolate Manufacturing Company and the Lewis Candy Company were admittedly made in a small way (R. 61, 62, 180, 181), and their promise to render such an arrangement proportionally available to competitors in the future is, as yet, untested by experience. Finally, the Commission justifiably felt that it could not ignore, as petitioners appear to do, petitioners' instructions to their salesmen to advise other customers that they do not contribute to the advertising done by such customers (R. 162, 485), and the actual fact that petitioners had spent no money at all for ad-

vertising the candies of any other purchaser of dry dextrose from them (R. 57, 485).

Section 2 (e) does not require *purchasers* to *request* allowances similar to those offered their competitors from their sellers; in view of the customarily secret nature of such allowances, it requires the *sellers* to *accord* advertising allowances granted one purchaser to all purchasers "on proportionally equal terms." Also, for petitioners to urge that Curtiss was the only company with a volume of sales and a scale of national advertising large enough to justify advertising arrangements of this type, is squarely to blink the mandate of the statute that such allowances be "accorded to all purchasers on proportionally equal terms." This phrase was interpreted by both the House and Senate Judiciary Committees in exactly the same way:

The phrase "proportionally equal terms" is designed to prevent the limitation of such allowances to single customers on the ground that they alone can furnish the services or facilities or other consideration in the quantities specified. Where a competitor can furnish them in less quantity, but of the same relative value, he seems entitled, and this clause is designed to accord him, the right to a similar allowance commensurate with those facilities. (H. Rep.

2287, 74th Cong., 2d Sess., p. 16; S. Rep. 1502, 74th Cong., 2d Sess., p. 8.)

Petitioners' insistence upon a volume of sales and scale of distribution equivalent to Curtiss' has the practical effect of depriving of proportional treatment competitors who can furnish advertising services but can furnish them "in less quantity" than Curtiss.

Petitioners' very contentions underscore the clear support in the evidence for the Commission's finding that advertising allowances were not "accorded to all purchasers on proportionally equal terms."

G. PETITIONERS' SALES OF DEXTROSE TO CURTISS WERE SUFFICIENTLY CONNECTED WITH INTERSTATE COMMERCE TO BRING THOSE TRANSACTIONS WITHIN THE SCOPE OF SECTION 2 (E)

Petitioners' last point with respect to advertising allowances gives this Court an option as to additional language that should be read into Section 2 (e). They urge, as a first possibility, that the Court should construe Section 2 (e) to apply only to transactions "in the course of commerce," on the ground that Sections 2 (a), (c), and (d) apply to transactions "in the course of commerce." Apart from the fact that the omission in Section 2 (e) may have been purposeful rather than inadvertent, it seems clear from the record that petitioners are "persons engaged in commerce" and that the advertising allowances are made "in the course of such commerce." Peti-

tioners' alternative suggestion, based on constitutional considerations, that the Commission be required to prove that the advertising allowances "substantially affect interstate commerce" is more than met by the showing that has been made with respect to the volume of Curtiss' purchases of dextrose and glucose from petitioners; the interstate and national character of Curtiss' business, which was concededly the primary motivation for petitioners' extension to them of advertising allowances; the fact that petitioners' advertising allowances amounted to the substantial sum of \$750,000 over a period of three years; and Curtiss' admission that they competed in the sale of their candies with all manufacturers of one-cent and five-cent bars (see pp. 59-60, *supra*; R. 301). *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349 (1941), supplies no clue as to the statutory interpretation of Section 2 (e), for it concerns Section 5 of the Federal Trade Commission Act, adopted in 1914, which limits the Commission's jurisdiction to "unfair methods of competition in commerce." Also, it presents no constitutional impediment to the exercise of administrative authority in this case, because the *Bunte* case revolved around an issue of statutory and not constitutional interpretation.

Since petitioners fail to show error in the Commission's conclusion that the advertising allowances granted by petitioners to Curtiss constituted an ille-

gal discrimination under Section 2 (e) of the Clayton Act the provisions of the order based on this conclusion, should be upheld.

# CONCLUSION

For the reasons stated the judgment below should be affirmed.

Respectfully submitted.

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FEBRUARY 1945

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# SUPREME COURT OF THE UNITED STATES.

No. 680.—OCTOBER TERM, 1944.

Corn Products Refining Company,  
and Corn Products Sales Com-  
pany, Petitioners,  
vs.  
Federal Trade Commission.

On Writ of Certiorari to the  
United States Circuit Court  
of Appeals for the Seventh  
Circuit.

[April 23, 1945.]

Mr. Chief Justice STONE delivered the opinion of the Court.

Petitioners, a parent corporation and its sales subsidiary, use a basing point system of pricing in their sales of glucose. They sell only at delivered prices, computed by adding to a base price at Chicago the published freight tariff from Chicago to the several points of delivery, even though deliveries are in fact made from their factory at Kansas City as well as from their Chicago factory. Consequently there is included in the delivered price on shipments from Kansas City an amount of "freight" which usually does not correspond to freight actually paid by petitioners.

The Federal Trade Commission instituted this proceeding under § 11 of the Clayton Act, c. 323, 38 Stat. 730, 15 U. S. C. § 21, charging that petitioners' use of this single basing point system resulted in discriminations in price between different purchasers of the glucose, and violated § 2(a) of the Act, as amended by § 1 of the Robinson-Patman Act, c. 592, 49 Stat. 1526, 15 U. S. C. § 13. The complaint also charged petitioners with other discriminations in prices, or in services rendered to favored customers, which will presently be stated in detail, all in violation of § 2(a) or § 2(e) of the Clayton Act, as amended.

Section 2(a) provides in part:

"(a) . . . it shall be unlawful for any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the

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benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . ."

After hearings, at which much of the evidence was stipulated, the Commission made its findings of fact. It concluded that petitioners had violated § 2 of the Clayton Act, as amended, and ordered them to cease and desist from such violations. On petition to review the Commission's order, the Circuit Court of Appeals for the Seventh Circuit sustained the order, except in particulars not material here. 144 F. 2d 211.

We granted certiorari, 323 U. S. —, because the questions involved are of importance in the administration of the Clayton Act in view of the widespread use of basing point price systems. The principal questions for decision are whether, when shipments are made from Kansas City, petitioners' basing point system results in discriminations in price between different purchasers of glucose, within the meaning of § 2(a); and, if so, whether there is support in the evidence for the finding of the Commission that these discriminations have the effect on competition defined by that section. Further questions are raised as to whether the other discriminations charged violate § 2(a) and § 2(e).

### I. *Basing Point Practices.*

The evidence as to petitioners' basing point system for the sale of glucose was stipulated. The Commission found from the evidence that petitioners have two plants for the manufacture of glucose or corn syrup, one at Argo, Illinois, within the Chicago switching district, and the other at Kansas City, Missouri. The Chicago plant has been in operation since 1910, and that at Kansas City since 1922. Petitioners' bulk sales of glucose are at delivered prices, which are computed, whether the shipments are from Chicago or Kansas City, at petitioners' Chicago prices, plus the freight rate from Chicago to the place of delivery. Thus purchasers in all places other than Chicago pay a higher price than do Chicago purchasers. And in the case of all shipments from

Kansas City to purchasers in cities having a lower freight rate from Kansas City than from Chicago, the delivered price includes unearned or "phantom" freight, to the extent of the difference in freight rates. Conversely, when the freight from Kansas City to the point of delivery is more than that from Chicago, petitioners must "absorb" freight upon shipments from Kansas City, to the extent of the difference in freight.

The Commission illustrated the operation of the system by petitioners' delivered prices for glucose in bulk in twelve western and southwestern cities, to which shipments were usually made from Kansas City. On August 1, 1939, the freight rates to these points of delivery from Chicago were found to exceed those from Kansas City by from 4 to 40 cents per hundred pounds, and to that extent the delivered prices included unearned or phantom freight. As petitioners' Chicago price was then \$2.09 per hundred pounds, this phantom freight factor with respect to deliveries to these twelve cities represented from 2 to 19% of the Chicago base price. From this it follows, as will presently be seen, that petitioners' net return at their Kansas City factory on sales to these twelve cities, in effect their f. o. b. factory price, varied according to the amount of phantom freight included in the delivered price.

Much of petitioners' glucose is sold to candy manufacturers, who are in competition with each other in the sale of their candy. Glucose is the principal ingredient in many varieties of low priced candies, which are sold on narrow margins of profit. Customers for such candies may be diverted from one manufacturer to another by a difference in price of a small fraction of a cent per pound.

The Commission found that the higher prices paid for glucose purchased from petitioners by candy manufacturers located in cities other than Chicago, result in varying degree in higher costs of producing the candies. The degree in each instance varies with the difference in the delivered price of the glucose, and the proportion of glucose in the particular candy. Manufacturers who pay unearned or phantom freight under petitioners' basing point system necessarily pay relatively higher costs for their raw mate-

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rial than do those manufacturers whose location with relation to the basing point is such that they are able to purchase at the base price plus only the freight actually paid. The Commission found that the payment of these increased prices imposed by the basing point system "may . . . diminish" the manufacturers' ability to compete with those buyers at lower prices.

The Commission concluded from these facts that petitioners' basing point system resulted in discriminations in price among purchasers of glucose, and that the discriminations result in substantial harm to competition among such purchasers. Petitioners challenge each conclusion.

*First.* Section 2(a) of the Clayton Act, as amended, makes it unlawful for any person "either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality. . . ." The statute permits differentials "which make only due allowance for differences in costs of manufacture, sale, or delivery. . . ."

Petitioners' pricing system results inevitably in systematic price discriminations, since the prices they receive upon deliveries from Kansas City bear relation to factors other than actual costs of production or delivery. As in the case of the twelve cities selected by the Commission for illustrative purposes, the freight actually paid by petitioners in making deliveries usually varies from the freight factor from Chicago, used in computing the delivered price. When the actual freight is the lesser of the two, petitioners charge and collect unearned or phantom freight; when it is the greater, petitioners absorb the excess freight, which they pay, but do not include in the computation of their delivered price.

In either event, on shipments from Kansas City, the delivered price to the purchaser depends not only on the base price plus the actual freight from Kansas City, but also upon the difference between the actual freight paid and the freight rate from Chicago which is included in the delivered price. This difference also results in varying net prices to petitioners at their factory at Kansas City, according to the destination of the glucose. The factory net varies according as petitioners collect phantom freight or absorb freight, and in each case in the amount of this freight.

differential.<sup>1</sup> The price discriminations resulting from this systematic inclusion of the freight differential in computing the delivered price are not specifically permitted by the statute. Hence they are unlawful, unless, as petitioners argue, there is an implicit exception to the statute for such a basing point system.

Petitioners point out that there is no discrimination under their basing point system between buyers at the same points of delivery, and urge that the prohibition of § 2(a) is directed only at price discriminations between buyers at the same delivery points. There is nothing in the words of the statute to support such a distinction, since the statute is not couched in terms of locality. And its purpose to prevent injuries to competition through price discriminations would preclude any such distinction, not required by its language. The purchasers of glucose from petitioners are found to be in competition with each other, even though they are in different localities. The injury to the competition of purchasers in different localities is no less harmful than if they were in the same city.

We find nothing in the legislative history of the Clayton or Robinson-Patman Acts to support the suggested distinction. It is true that § 3 of the Robinson-Patman Act, 15 U. S. C. § 13a, incorporating the Borah-Van Nuys Bill, S. 4171, 74th Cong., 2d Sess., imposes criminal penalties for selling goods "in any part

the illustrative prices found by the Commission show this sharply varying factory net also the amounts of phantom freight. The figures given are upon deliveries from as City for August 1, 1939, when the Chicago base price was \$2.09.

	A	B	C	D	E	F
		Delivered Price (Chicago Base Price, \$2.09, plus Column A)	Actual Freight from Kansas City	Net to Petitioners at Factory in Kansas City (Column B minus Column C)	Variance in Petitioners' Net from their Net on Deliveries at Kansas City	Phantom Freight (Column A minus Column C)
as City, Missouri	\$.40	\$2.49	\$.00	\$2.49	\$.00	\$.40
Joseph, Missouri	.40	2.49	.09	2.40	-.09	.31
gfield, Missouri	.40	2.49	.36	2.13	-.36	.04
Smith, Arkansas	.65	2.74	.45	2.29	-.20	.20
inson, Kansas	.61	2.70	.36	2.34	-.15	.25
in, Nebraska	.45	2.54	.13	2.41	-.08	.32
City, Iowa	.40	2.49	.24	2.25	-.24	.16
Texas	.85	2.94	.63	2.31	-.18	.22
man, Texas	.77	2.86	.54	2.32	-.17	.23
Antonio, Texas	.88	2.97	.69	2.28	-.21	.19
er, Colorado	.66	2.75	.56	2.19	-.30	.10
Lake City, Utah	.77	2.86	.67	2.19	-.30	.10



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of the United States at prices lower than those exacted . . . elsewhere in the United States for the purpose of destroying competition . . . " But this section does not restrict the operation of the prohibitions, with civil sanctions, of the Robinson-Patman amendments to § 2(a) of the Clayton Act. This was specifically pointed out by the Conference Report on the Robinson-Patman Act.<sup>2</sup> H. Rep. No. 2951, 74th Cong., 2d Sess., p. 8.

Petitioners further contend that basing point systems were well known prior to the enactment of the Robinson-Patman Act and were considered by Congress to be legal. From this petitioners conclude that they remained legal in the absence of a clear command to the contrary. Cf. *Parker v. Motor Boat Sales*, 314 U. S. 244; *Helvering v. Griffiths*, 318 U. S. 371. But we think that the premise falls, and with it the conclusion, whatever it might be if the premise were valid.

In support of the legality of basing point systems, petitioners rely on *Maple Flooring Assn. v. United States*, 268 U. S. 563, 570, and *Cement Manufacturers Assn. v. United States*, 268 U. S. 588, 597. But these were suits to restrain violations of the Sherman Act, and did not involve the prohibition of the Clayton Act upon discriminations in price. The only question for decision in those cases was whether there was a concerted price-fixing scheme among competing sellers, accomplished in part by their adoption of a uniform basing point system; in fact, no prohibited concert of action was found.

In any event, the basing point systems involved in those cases were quite unlike that used by petitioners. In the *Maple Flooring* case, *supra*, the single basing point was so close to most of the points of production as to result in but trivial freight variances; and the defendants in that case were willing to sell on a f. o. b. mill basis, whenever the purchaser so requested. In the *Cement* case, *supra*, the defendants used a multiple basing point system, with a basing point at or near each point of production. Under this system, any manufacturer, in order to compete in the territory closer freightwise to another, would absorb freight, by adjusting his mill price to make his delivered price as low as that of his competitors. Under this system the delivered price for any locality was determined by the nearest basing point. We have no occasion to decide whether a basing point system such as

<sup>2</sup> The report said: "Section 3 authorizes nothing which that amendment [to § 2 of the Clayton Act] prohibits, and takes nothing from it."



that in the *Cement* case is permissible under the Clayton Act, in view of the provisions of § 2(b), permitting reductions in price in order to meet a competitor's equally low price. Cf. *Federal Trade Commission v. A. E. Staley Mfg. Co.*, No. 559, decided this day.

When the Robinson-Patman Act was adopted in 1936, there was no settled construction of the Clayton Act in the federal courts contrary to that now urged by the Commission, as was the case with the measures involved in *Helvering v. Griffiths*, *supra*. Nor was there any settled administrative construction to the contrary. In fact in 1924 in the only decision involving the problem, the Federal Trade Commission, after extensive investigation and hearings, ordered the United States Steel Corporation, and its subsidiaries to cease and desist from the sales of their rolled steel products on the "Pittsburgh-Plus" price system. 8 F. T. C. 1. The Commission held that the use of a single basing point at Pittsburgh for steel plants over the country was a violation of § 2 of the Clayton Act, as well as § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, as they then read. The respondents in that case sought no review of the Commission's order and filed with the Commission a formal statement of intended compliance with it. Petitioners also rely on the failure of the Commission to make further orders against basing point systems in the period from 1924 to the passage of the Robinson-Patman Act in 1936. The Commission undertook no further proceedings because of difficulties of enforcement which it attributed to the exemption provisions of § 2 and to decisions of the lower federal courts in Clayton Act cases. Instead it pressed for clarifying amendments to the Act. See the Commission's Final Report on the Chain Store Investigation (1936), Sen. Doc. No. 4, 74th Cong., 1st Sess., pp. 89, 90, 96-97. The Robinson-Patman Act was adopted in response to the Commission's recommendation that defects in § 2 be remedied and its prohibition of price discrimination strengthened.

Finally, petitioners argue that Congress, by the rejection of a provision of the Robinson-Patman Bill, which would have in effect prohibited all basing point systems, has indicated its intention to sanction all such systems. This provision, as reported to the House by the Committee on the Judiciary, would have defined "price", as used in § 2 of the Clayton Act, as meaning "the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor."

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The practical effect of this provision would have been to require that the price of all commodities sold in interstate commerce be computed on an f. o. b. factory basis, in order to avoid the prohibited discriminations in selling price. It would have prohibited any system of uniform delivered prices, as well as any basing point system of delivered prices. These effects were recognized in the Committee's report, see H. Rep. No. 2287, 74th Cong., 2d Sess., p. 14, and in the debates upon the Robinson-Patman Bill. Cf. 80 Cong. Rec. 8118; 8223-8224. Indeed, the provision would have prohibited such a multiple basing point system as that in *Cement Manufacturers Assn. v. United States*, *supra*, as well as the present system.

Such a drastic change in existing pricing systems as would have been effected by the proposed amendment engendered opposition, which finally led to the withdrawal of the provision by the House Committee on the Judiciary. 80 Cong. Rec. 8102, 8140, 8224. We think this legislative history indicates only that Congress was unwilling to require f. o. b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se. On the contrary we think that it left the legality of such systems to be determined accordingly as they might be within the reach of § 2(a), as enacted, and its more restricted prohibitions of discriminations in delivered prices.

We conclude that the discriminations involved in petitioners' pricing system are within the prohibition of the Act. We pass to the question whether these discriminations had the prescribed effect on competition.

*Second.* Section 2(a) of the Clayton Act, as amended, prohibits only discriminations whose "effect . . . may be substantially to lessen competition . . . in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ." Petitioners insist that the Commission's findings, based upon the facts stipulated, do not support its conclusion that petitioners' discriminations have the prescribed effect.

It is to be observed that § 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations "in their incipency," before the harm to competition is effected. It is enough that they "may" have the prescribed effect. Cf. *Stand-*



*ard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 356-357. But as was held in the *Standard Fashion* case, *supra*, with respect to the like provisions of § 3 of the Clayton Act, 'prohibiting tying clause agreements, the effect of which "may be to substantially lessen competition," the use of the word "may" was not to prohibit discriminations having "the mere possibility" of those consequences, but to reach those which would probably have the defined effect on competition.

Since petitioners' basing point system results in a Chicago delivered price which is always lower than any other, including that at Kansas City, a natural effect of the system is the creation of a favored price zone for the purchasers of glucose in Chicago and vicinity, which does not extend to other points of manufacture and shipment of glucose. Since the cost of glucose, a principal ingredient of low-priced candy, is less at Chicago, candy manufacturers there are in a better position to compete for business, and manufacturers of candy located near other factories producing glucose, distant from the basing point, as Kansas City, are in a less favorable position. The consequence is, as found by the Commission, that several manufacturers of candy, who were formerly located in Kansas City or other cities served from petitioners' Kansas City plant, have moved their factories to Chicago.

Further, we have seen that prices in cities to which shipments are made from Kansas City, are frequently discriminatory, since the prices in such cities usually vary according to factors, phantom freight or freight absorption, which are unrelated to any proper element of actual cost. And these systematic differentials are frequently appreciable in amount. The Commission's findings that glucose is a principal ingredient of low price candy and that differences of small fractions of a cent in the sales price of such candy are enough to divert business from one manufacturer to another, readily admit of the Commission's inference that there is a reasonable probability that the effect of the discriminations may be substantially to lessen competition.

The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts. See *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52, 63; *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 73; cf. *Labor Board v. Southern Bell Tel. Co.*, 319 U. S. 50, 60. We cannot say that the Commission's inference here is not supported by

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the stipulated facts, or that it does not support the Commission's order.

II. *Booking Practices.*

Ordinarily, when petitioners announce an advance in the price of glucose, they allow their customers a period of five days to "book" orders, that is, secure options to purchase, at the old price, and a period of thirty days in which to take delivery upon the options. The Commission charged that petitioners have further violated § 2(a) of the Clayton Act, as amended, by permitting certain favored customers to secure options for the purchase of glucose, and to take delivery at the old price, for periods longer than those usually permitted to other customers. The Commission also charged other violations of § 2(a) in that petitioners favored certain tank wagon customers by permitting them to book orders at the lower prices charged for tank car deliveries; and to take deliveries by tank wagon over extended periods of time. The Commission found, upon ample evidence, that these discriminations were in fact made by petitioners.

Petitioners assert that the practices prohibited by § 2(a) are discriminations in price, and not in the terms and conditions of sale other than price. They rely on the fact that in the course of the progress of the Robinson-Patman bill through Congress, the phrase "terms of sale", originally included in the prohibited discriminations, was stricken from the bill. But even if the contention be accepted, we cannot ignore the fact that the present discriminations in the terms of sale operated to permit the favored customers to purchase at a lower price than other customers, so that their only practical effect was to establish discriminations in price, precisely the evil at which the statute was aimed. And the Conference Committee, in reporting on this elimination of the phrase "terms of sale" from the bill, made it clear that § 2(a) still applied to indirect as well as direct discriminations in price. It said that with the elimination of the phrase "terms of sale", the act is inapplicable to "terms of sale except as they amount in effect to the indirect discriminations in price within the meaning of the remainder of subsection (a)." H. Rep. No. 2951, 74th Cong., 2nd Sess., p. 5.

Petitioners also contend that these sales to favored customers were to meet the competition of other sellers of glucose, and were therefore excepted from the prohibition of § 2(a), by the proviso

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of subsection (b) of § 2 of the Clayton Act, as amended. Subsection (b) provides:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price . . . the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ."

The only evidence said to rebut the prima facie case made by proof of the price discriminations was given by witnesses who had no personal knowledge of the transactions and was limited to statements of each witness's assumption or conclusion that the price discriminations were justified by competition. Examination of the testimony satisfies us, as it did the court below, that it was insufficient to sustain a finding that the lower prices allowed to favored customers were in fact made to meet competition. Hence petitioners failed to sustain the burden of showing that the price discriminations were granted for the purpose of meeting competition. Cf. *Federal Trade Commission v. A. E. Staley Mfg. Co.*, No. 559, decided this day.

Finally it is contended that there was no evidence to support the Commission's finding, which was referable to these practices as well as petitioners' basing point practices, that the discriminations in price may diminish competition within the meaning of § 2(a). This finding as to the effect of both types of discrimination was based on the same stipulation of facts which we have already considered in connection with the basing point practices. Since the customers here are the same manufacturers of low-priced candies as were there involved, and since the price discriminations here are relatively substantial in a field where differences of a fraction of a cent in the price of candy are sufficient to divert business from one manufacturer to another, we think that the stipulation, which we find to be applicable to these as well as the basing point practices, is sufficient to support the finding of the prescribed effect on competition.



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III. *Discounts to Purchasers of By-products.*

Still other price discriminations by petitioners charged and found by the Commission were discounts allowed to certain favored purchasers of gluten feed and meal, by-products of petitioners' refining of corn, and other discounts allowed to certain favored purchasers of starch and starch products. It was not and is not contended that these allowances were due to differences in the cost of manufacture, sale or delivery. But it is asserted that these discriminations did not violate § 2(a), since there was not the requisite effect on competition.

It was stipulated, and the Commission found, that the allowances in question were "sufficient", if and when reflected in whole or in substantial part in resale prices, to attract business to the favored purchasers away from their competitors, "or to force [their] competitors to resell . . . at a substantially reduced profit, or to refrain from reselling." But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition.

IV. *Advertising Allowances.*

The Commission also charged and found that petitioners violated § 2(e) of the Clayton Act, which provides:

"(e) . . . it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

The alleged violation consisted of advertising expenditures made by petitioners for the Curtiss Candy Company in order to promote the sale of dextrose or corn sugar for use in candy manufacture. For this purpose petitioners entered into an arrangement with the Curtiss Candy Company, whereby during the years 1936 to 1939



they spent over \$750,000 in advertising Curtiss candy as being "rich in dextrose". At the same time Curtiss advertised its candy as being "rich in dextrose", and made the same statement on its labels. While Curtiss was free to purchase dextrose used in the advertised candies from other manufacturers, it in fact made all such purchases from petitioners, in annually increasing quantities until it purchased a total of seven million pounds in 1939. During the same period it purchased of petitioners large quantities of glucose, the purchases increasing from nothing in 1937 to almost fifteen million pounds in 1939. Although petitioners sold dextrose to others, it did not furnish proportionally equal advertising services to them.

Petitioners say that the advertising arrangement is not forbidden by § 2(e) because it was not made with the Curtiss Candy Company as a "purchaser". But during the period in question the Curtiss Company was in fact a purchaser of petitioners' commodity. The Commission could properly infer that the advertising for which petitioners paid, contemplated the sale of that commodity to Curtiss, and that the advertising contemplated the offering for sale of the candy by Curtiss. Petitioners thus furnished a service connected with the sale or offering for sale of a commodity, upon terms not accorded to other purchasers. The statute does not require that the discrimination in favor of one purchaser against another shall be provided for in a purchase contract or be required by it. It is enough if the discrimination be made in favor of one who is a purchaser and denied to another purchaser or other purchasers of the commodity.

It is said also that the Curtiss Company was not a purchaser of a commodity "bought for resale, with or without processing" within the meaning of § 2(e), since the Curtiss Company buys dextrose from petitioners, but uses it with other ingredients to produce candy, an entirely new commodity, which it sells. While the Act does not define the term "processing", the conversion of dextrose into candy would seem to conform to the current understanding that processing is a mode of treatment of materials to be transformed or reduced to a different state or thing. See *Cochran v. Deener*, 94 U. S. 780, 788. In view of the purpose of the statute to prevent the enumerated discriminations attending the sale of a commodity for resale, the precise nature or extent of the processing before resale would seem to be immaterial. The statute is aimed at discrimination by supplying facilities or services to a purchaser.

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not accorded to others, in all cases where the commodity is to be resold, whether in its original form or in a processed product. The evils of the discrimination would seem to be the same whether the processing results in little or much alteration in the character of the commodity purchased and resold.

And finally it is said that the Commission was without jurisdiction because the dextrose sold by petitioners to Curtiss was not found to have been sold in interstate commerce; that if the section is construed to apply to such transactions, it would be unconstitutional; and that in any case there is no showing that the transactions complained of, although not themselves in interstate commerce, have in any way affected such commerce. But the effect upon the commerce is amply shown by the interstate and national character of the Curtiss Company's business; by petitioners' advertising for Curtiss, which was itself frequently in interstate commerce, amounting to \$750,000; and by Curtiss's own admission that it competed in the sale of its candy in interstate commerce, with all manufacturers of one cent and five cent bars of candy. Moreover, some of petitioners' sales to other companies, to whom these allowances were not accorded, were made in interstate commerce; thus there was a discrimination against sales in interstate commerce, well within the power of the Commission to remedy.

Petitioners make a number of other arguments or contentions of lesser moment which we have considered but find it unnecessary to discuss. We conclude that the advertising furnished by petitioners was a service or facility "connected with the processing . . . sale, or offering for sale" of the commodity purchased by the Curtiss Company upon terms not accorded to other purchasers, and therefore violated the statute.

The several violations of §§ 2(a) and 2(e) of the Clayton Act, found by the Commission, sustained by the court below, and brought here for review, fall within the prohibitions of the Act. The Commission's conclusions are amply supported by its findings and the evidence, and the judgment is

*Affirmed.*

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

Mr. Justice JACKSON concurs in the result.

